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ABSTRACT

Educational leaders have a continuing need to know the legal parameters within which decisions may be made concerning student behavior. In times past, administrative decisions could be made without fear of judicial review. Today this is no longer the case, as courts are ready to come to the rescue of constitutional rights of not only students but faculty, administrators, trustees, and the general public as well. The pertinent legal questions facing educational leaders today range from search and seizure rights, due process requirements of notice and hearing, interim suspension, specificity of rules, and scholastic affairs, to civil actions and double jeopardy. These and many other questions were the concerns of the conference "Higher Education: The Law and Student Protest." The central purpose of the conference was to present and discuss judicial decisions and trends and their implications for and applications to the posture of academic decisionmaking. The issues of concern were questioned and examined, not from a philosophical or sociological point of view, but in light of court decisions and precedents. (Author/HS)

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'GHER EDUCATION:

THE LAW AND STUDENT PROTEST

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UNIVERSITY OF GEORGIA Institute of Higher Education - Center for Continuing Education

Proceedings of Conference on

H I G H E R E D U C A T I O N:
T H E L A W A N D S T U D E N T P R O T E S T

Edited by

D. Parker Young

Sponsored by

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Athens, Georgia

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INTRODUCTION

Educational leaders have a continuing need to know the legal parameters within which decisions may be made concerning student behavior. In times past administrative decisions could be made without fear of judicial review. Today this is no longer the case as courts are ready to come to the rescue of constitutional rights of not only students, but faculty, administrators, trustees and the general public as well. The pertinent legal questions facing educational leaders today range from search and seizure rights, due process requirements of notice and hearing, interim suspension, specificity of rules, scholastic affairs, to civil actions and double jeopardy.

These and many other questions were the concerns of the conference "Higher Education: The Law and Student Protest" sponsored jointly by the Institute of Higher Education and the Center for Continuing Education and held at the University of Georgia Center for Continuing Education June 23-24, 1970. The central purpose of the conference was to present and discuss judicial decisions and trends and their implications for and applications to the posture of academic decision-making. The issues of concern were questioned and examined, not from a philosophical or sociological point of view, but rather, in light of court decisions and precedents. The issues discussed by the conference speakers are the subject of this publication.

Dean DeJarmon depicted the mood on many campuses when he commented that commencement exercises, which traditionally reflect the joy of the graduates and the pride of the parents, "...this year served as a vehicle for protest, walkouts, and in some instances were not held at all." He further stated that the search for objective truths by the college or university is difficult for students to accept against the background of viewing in their lifetime those institutions as a means to accomplish some politically expedient end. He further asserted "the college has the authority and the duty to insure the maintenance of order and decorum within the educational system, and also the right to prevent in its inception a student riot and to prevent students from taking over and damaging buildings on the campus. Yet, it must pursue these duties with care and caution, lest its actions result in a deprivation of civil rights, thus opening the college to civil actions at both law and equity."

Dean Yegge made a plea for architects of autonomy and stated "the answer is not to give up on autonomy; rather, it is to recognize our new role and consistent with that new role and our traditional purposes, to cling jealously to what remains of our institutional autonomy, nay, to find new ways to preserve the autonomy which we must possess." Dean Yegge charged that higher education must restructure its approach to self government in order that sufficient autonomy remains with the institution.

I set forth the requirements of due process in dealing with student protest and discipline in higher education. Disciplinary procedures may well vary with the institution and the circumstances. However, I stated that "surely in an institution of higher learning which is dedicated to seeking the truth in an open free marketplace of ideas, fairness and justice for all should prevail." I

further stated that "Due process does not require the administration to allow protestors to materially disrupt the lawful on-going activities of the school, nor to interfere with the rights of others, nor finally to close down the institution." In making a plea for the maintenance of an open free marketplace of ideas, I called upon colleges and universities to: first, determine their lawful aims and purposes; second, determine the rules, regulations, and standards necessary for the implementation of those aims and purposes; third, make them known to all comers; and finally, enforce them--"fairly and justly--ever realizing that students do not shed their constitutional rights at the campus gate nor do they acquire any special privileges."

In discussing problems of dual jurisdiction between the campus and the community, Dean Cowen stated that in his view a division of jurisdiction ought to be attempted along geographical lines. He said, "If the student, in protest or otherwise, leaves the campus and commits an act of violence, I would leave the matter entirely within the hands of the community.... As for events on campus, I stand firmly for the proposition that the campus should exercise both initial and primary jurisdiction and that the community should become involved only in a supportive role and only upon specific request of the campus."

Mr. McCay, in addressing himself to the legal aspects of protest and discipline in private institutions, suggested that the privateness of some institutions may be eroding as they are performing a public purpose as well as receiving large amounts of public funds in many instances.

Both judicial and non-judicial remedies for student protest problems were outlined by Mr. Hill. He indicated that injunctions have thus far proven the most effective legal remedy in ending student disturbances. In considering which remedies to use he concluded that "the ultimate choice of remedies lies with the school administrator. In selecting which remedy or remedies to use, he should consider the nature of the disturbance, its objectives, his faculty and student body, his superiors and the public, particularly the community in which the institution is located, and the historic relationship between his students and the local police and the courts. He should think first of how to prevent the disturbance and think secondly of how to out-think it."

The law never is and the papers presented here are not intended to be the last word pertaining to aspects of "Higher Education: The Law and Student Protest." The conference presentations as well as the question and answer sessions, hosever, made clear that institutions have an inherent right and a duty to maintain order and freedom on campus. While the procedures in student discipline cases may vary according to institutions and the circumstances in each case, students do not shed their constitutional rights upon entrance into an institution of higher learning. In these times of great turmoil and upheaval, maintenance of the free marketplace of ideas is the greatest challenge faced by colleges and universities.

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Athens, Georgia
August 15, 1970

STUDENT-INSTITUTIONAL RELATIONSHIPS

LeMarquis DeJarmon

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In the Spring of 1936, as this nation was attempting to work its way out of the great depression of 1930-1931, we witnessed a revolution in Spain, an invasion of Ethiopia, re-armament and military skirmishes in Europe. In early June of 1936, the seventeenth year cicada made its traditional appearance. The commencement speakers of that spring assured the graduating classes and the public that we, in spite of all the problems of that day, need not have fear of our basic liberties as long as the lights in the universities of this country were still burning. The universities, in their pursuit of truth and in their ordered research continuously pushing forward the frontier of knowledge, would soon find a solution for our problems and build a better society.

Now, in early June of 1970, the seventeenth year cicada has again appeared--its second appearance since 1936. This time, however, the cicadae found open combat in the Far East, military skirmishes in the Near East, cold hostility between east and west, the universities in ferment and turmoil. Indeed, many of them closed because of violent disruptions that made ordered research impossible and continued operations dangerous, if not unwise. Commencement exercises, the traditional academic ceremony reflecting the joy of the graduates and the pride of the parents, this year served as a vehicle for protest, walk-outs, and in some instances were not held at all.

In light of these changed circumstances, it is indeed appropriate, fitting, and proper that those of us in the field of higher education look in depth to the Law and Student Protest and most certainly look searchingly and critically at Student-Institutional Relationships.

As a youth growing up in eastern Ohio that bordered on the bituminous coal fields of western Pennsylvania, I heard stories that the coal miners would always carry a bird of some kind down into the mines with them. Some of these mines, I was told, were almost a mile below the surface. As a youth accustomed to seeing birds flying free and high in the blue Ohio sky, it struck me as humorous that a bird would be flying a mile below the surface of the earth. Some years later, I had the occasion to talk to a retired coal miner from that region, and I asked him if the story was true. He said, yes, it was true, that in his early days he always carried a bird. The reason, he told, was that the bird, accustomed to being carefree and accustomed to the open air, was more sensitive to danger. Consequently, while a mile below surface, if the bird would start "acting up," the miners knew it was time for them to start looking out for effects of deadly coal gas and other poisonous fumes in the mine tunnel and preparing for their own safety.

It may be that many of us have not yet fully grasped and mastered the lesson

of the bird and the miner, but this conference is a beginning.

In the middle 1960's, a young president of a small college met with a student delegation, and after listening to their "grievances" concerning some minor changes in the college's rules, told the delegation that their requests had no merit; in fact, they were the least meritorious complaints that he had heard "in all my forty-four years alive." A young student standing near the edge of the group, audibly, poetically, and prophetically declared: "But it only stands to reason, that before another season, you'll be wiser by the time you're forty-five."

How did it come to pass that a college student would have the courage to address a college president in such manner? Since the school year of 69-70, many college and university presidents are beginning to notice the actions of the "birds" and then search out factors that threaten the safety of the university. In fact, they are becoming aware that campus unrest is a major problem of national concern. So great is this concern that the American Bar Association appointed a commission to study the major problem of today. Most recently that Commission made its report[1] and had this say on the differences concerning the proper function of a university in American Society:

> ...Traditionally, most faculty members have struggled to keep universities apart from the divisive social problems of the nation, as neutral institutions seeking objective truth. Some students dispute the neutrality of higher education, asserting that modern universities have become the handmaiden of a military-industrial complex, both in their educational mission of teaching and research and their financial entanglements resulting from grants, contracts, and investments. Other students eschew such a characterization but assert that universities should reject neutrality and become, in the words of the Brock Committee, "partisans of the progressive forces in society."
>
> Some claim that universities exist primarily for students. Others contend that society in general is the principal intended beneficiary of higher education. Although there is obviously some truth in both points of view, the difference in emphasis may assume considerable significance in evaluating demands and proposals for change.
>
> The hierarchical nature of universities and the preferred status of some members of the faculty runs counter to the egalitarian notions of some who assert that all who are affected are equally capable of participating in the decisions that confront the academic community and that no group is entitled to special privilege. Minority group students have special concerns about the relevance of the traditional degree programs for some, especially those who aspire to provide leadership for the disadvantaged....

These divergent attitudes on the proper function of the university have a significant bearing on our approach to student-institutional relations. An understanding of some of the possible reasons for these attitudes may help us to fashion more meaningful individual relationships.

A self-study approach to the reasons behind these attitudes may well serve as a harbinger of the relations we wish to establish. In the words of Justice

Oliver Wendell Holmes, "A page of history may be worth a volume of logic," in this undertaking. It must be remembered that the present generation of college students have spent the major portion of their lives listening to the counsel of dissent and disrespect. This year's average college freshman was only three or four years old in May of 1954. This year's average college senior was only seven or eight years old. To them the university, particularly the state-supported ones, has hardly been a neutral institution seeking objective truth. In their lifetime, they have seen these institutions as a means to accomplish some politically expedient end. They have seen classes and seminars conducted by graduate assistants while the full professors engage in outside research. They have seen schools created for the sole purpose of controlling the racial composition of the student body. The search for objective truth in this background is difficult for them to accept.

Once they question the basic function of the university, other basic premises of the university are likewise opened to scrutiny. Historically, the colleges and universities saw themselves as an essential part of a mutual process of teaching and learning. Thus, this was a process that took place between two contracting equals. Since the public policy of this country was that every citizen should have access to higher education, limited only by his capabilities, the concept that for the purpose of education, the universities stood in the place of the parents (in loco parentis) rapidly emerged and soon received judicial recognition.[2]

When American jurisdictions adopted the English concept of charitable immunities,[3] the colleges and universities were left more or less on their own to develop their own programs and to pursue their own destiny. Many in the field of higher education reasoned that since there is nothing in the Federal Constitution requiring a state to provide a system of public education at any level, the attendance at an institution of higher education was a matter of privilege which could be granted or withheld at the pleasure of the institution. However, attendance was not a "privilege or immunity" of federal citizenship protected against impairment by the Privilege and Immunity Clause of the Fourteenth Amendment.

In the decade of the Sixties and probably more so in the Seventies, these basic relations concepts will have to be re-examined. In 1954, the Supreme Court, in Brown v. Board of Education,[4] set the tone with these words:

> Today, education is perhaps the most important functions of the state and local governments.... It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening a child to cultured values, in preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

In line with the Brown language, the courts have declared that the "in loco parentis" doctrine is no longer tenable in the university community.[5] Although college attendance is not a "privilege or immunity" under the Privilege and Immunity Clause of the Fourteenth Amendment, it is nevertheless protected by the Due Process Clause

of that Amendment.[6] The standards of Due Process may materially affect the nature of the contract into which the student and the institution enters. Although private institutions--even those receiving substantial public funds--are not directly amenable to the Due Process Clause, nevertheless, their contracts may be subject to scrutiny by similar standards of fairness. The Ohio Court, in Schoppelrei v. Franklin University,[7] put the issue in this form:

> We come, then, to the conclusion that a court of Chancery may be justified in this country in hearing a complaint of this character where there has been unnecessary oppression and unfair dealings, and also in a case where there has been an expulsion that violates the purpose of the trust.

If we look at the International Shoe Company v. State of Washington,[8] where the Supreme Court equated procedural due process with our "traditional notions of fair play and substantial justice," the due process test enunciated in Dixon[9] and the "unnecessary oppression and fair dealings" test of Schoppelrei[10] are very far apart. As the courts have said on several occasions, one does not surrender his Civil rights or lose his First Amendment rights by matriculation at a college;[11] consequently, a state-supported institution cannot by contract condition admittance upon a waiver of these rights, whether the right is designated as within the penumbra of the First Amendment freedom of speech or as encompassed within the Ninth Amendment as an addition to the fundamental rights which exist along with those fundamental rights specifically mentioned in the first eight Amendments. One may well suggest that it would be "unnecessary oppression and unfair dealings" for one to be granted access to higher education only on a contractual waiver of fundamental rights, by an institution which for its advantage has opened its property for the carrying on of an important governmental function.[12]

So far, private institutions have had a great deal of success with the contract theory;[13] but in a fairly recent case--the shadow of Schoppelrei's "unnecessary oppression and unfair dealings"--seems to have been faintly cast. In Drucker v. New York University,[14] the university had refused to refund a registration fee to a graduate student who withdrew two days after registration but six days before the term opened. One sentence in the forty-five page bulletin specified, "No tuitions or fees returnable after the due date." The court held that charging the graduate student with acceptance of the content of the entire bulletin was sheer fiction, for he could only be bound by those provisions that the university had reasonably brought to his attention and to which he had given his assent. The court further said that the "contract" upon which the university relied had to be properly definable either by specific shape, form, or content. "For a contract is a living thing. It is born through the marriage of minds, each knowing the full extent of his commitment and each knowingly accepting the responsibilities of his charge. It follows, therefore, that if it was the intention of the defendant to burden the plaintiff with the results it now presses, it should have so set it forth in clear and unequivocal language...."

This language seems to suggest that in this type situation the unfair dealings are such that no binding contract would arise between the parties. In this respect, the reasonable notice of the salient section of the contract and an opportunity to assent requirement, appear to be identical to notice and opportunity to be heard standard that is required of state-supported schools.

The New York court, however, went even further and assumed arguendo that a contract did exist; even so, its burdensome effect would require the same results:

> To deprive the plaintiff student of his right to recovery would in effect confer on the defendant the power to construe the contract it alone authored and to make its harsh construction forever binding upon the plaintiff.[15]

The court's reference to the fact that the contract, i.e., bulletin, was authored by the university alone, carries overtones that the development of the law on contracts of adhesion and unconscionable contracts may be applicable in this area.[16] If the courts are willing to subject the university-drawn contract to the "oppression test" for the mere return of a portion of the fees, it would appear that even greater scrutiny would be given where contract provision of conduct which would control the student's entire academic career is involved.

From the standpoint of student-institutional relations in private colleges and universities, the "unnecessary oppression and unfair dealings" test may foreshadow the future course of litigation to a greater extent than the attempt to expand the "state action" concept as was the case in Howard University[17] and Tulane University[18] cases.

It appears to be clear, since Greene,[19] Grossner[20] and Powe,[21] that the state action concept will not be extended to private colleges solely on the fact that they receive substantial amounts of public funds. Generally, the public funds that a private institution receives do not have a direct relation to the subject of the complaint.

However, although both Grossner[22] and Powe[23] refused to extend "state action" concept to the private university, these cases may have more significance for their rejection than for what they held. In Grossner v. Trustees of Columbia University,[24] the students brought their action 28 USCA 1343 (3) (4) and 42 USCA 1983, the first a jurisdictional statute; the latter is one of the surviving sections of the Civil Rights Act of 1866. The latter provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity or other proper proceeding for redress.

The court, after finding that the receipt of federal funds would not make the university amenable to this statute, said that the jurisdiction under this statute is available for "state not for federal action." The court did not stop there; it went further, saying:

> The serious inquiry is not into the source of the "private" person's or organization's income, but into either or both of two subjects (which are not necessarily separate and distinct from each other):
> (a) How far are the State and the formally "private" agency truly independent of each other, or, what amounts to the same thing, how far has the state so "insinuated itself into a position of inter-dependence...that it must be recognized as a joint participant in the challenged ac-

tivity? Burton v. Wilmington Parking Authority, supra, 365 U. S. at 725m 81 S. Ct. 856.

(b) To what extent, if at all, is the university engaged in "state action" because, as plaintiffs argue, it "fulfills a public function of educating persons?"

This test, subsequently cited, approved and followed in Powe v. Miles,[25] may have great future significance to the private colleges and universities for several reasons: (1) By rejecting the relevancy of the receipt of Federal funds, now in Section 1983 situation, the courts must focus on the relation of State revenue to the overall private university budget, and (2) since more states are beginning to supply financial aid and assistance to its students enrolled in both public and private colleges.

Suppose we have a private university located in State X; suppose further that State X has enacted a State Aid Act which requires the college to notify the State Aid Agency of all its disciplinary cases. Now suppose the college's bulletin required attendance at all chapel programs. Suppose several students missed chapel program because they were peacefully demonstrating against the Cambodian invasion. They were disciplined by the college in accordance with its bulletin, and the report was made to the State Agency which cut off the students' financial aid. Query, could it be successfully maintained that under these circumstances, the state had not "insinuated itself into a position of interdependence that it must be recognized as a joint participant in this challenged activity?" /Point (a) of the Grossner test/

What if we consider that for every student enrolled in the state university, the state has to subsidize his cost in the excess of 50%, thus every private school student actually saves the state an educational cost an excess of 50% per capita; could it be successfully advanced that the private college was not engaged in state action in fulfilling a public function of educating persons?

These are areas that still require more judicial refinement, but I think the significance of Grossner and Powe is that they suggest that the zone between "public" and "private" in the field of education is becoming more and more contracted.

Earlier in this statement, I alluded to the charitable immunity doctrine that had been applied in order to protect the revenue of the institution from being diverted from its main purpose into the compensation for damages. Under this concept the college, university and the student were considered as being in the relation of trustee and beneficiary. Consequently, the institution would not be amenable to damages for its civil dereliction towards one who was the beneficiary of charitable purpose. Although this subject is not specifically with the scope of this conference, I believe that since this concept grew up along with our theories of In loco parentis, Contract and Right and Privilege, a word about its present status is germane here, for it may shed additional light on our topic of Institutional-Student Relations.

There are two fairly recent cases that may have future effect on our topic here.

In Davis v. Board of Trustees of Arkansas A and M College,[26] an action was brought against the college seeking damages following the termination of the plaintiff's status as faculty member. Like Grossner and Miles, this case was brought under Title 42 USCA, Section 1983. The significance of this case is that

no mention was made of the fact that the college had any type of immunity. In fact, the language of the court may foreshadow a new course of the Seventies. The court said:

> In a civil rights action where the plaintiff seeks damages as well as injunctive relief, as in this case, the only elements necessary in order to establish a claim are (1) the conduct complained of was engaged in under color of state law, and (2) that such conduct subjected the plaintiff to deprivation of rights, privileges or immunities secured by the Constitution of the United States.

Later on in the opinion, the court speaking through Chief Justice Oren Harris stated:

> It is admitted that this is an action in tort. As has been stated, this suit involves the deprivation of civil rights. An individual thus deprived is given a right of action at law. Such an action sounds in tort and exemplary or punitive damages may be awarded.

The second case, Cramer v. Hoffman,[27] followed the same general course--this action involved a suit for damages against St. Laurence University for injury of a football player sustained on the practice field. Again no mention was made of any immunity that may have been extended to the university.

If these cases point the path of the future, then the colleges and universities, public particularly, private possibly to a lesser extent, must police their relationships with care.

The college has the authority and the duty to insure the maintenance of order and decorum with the educational system,[28] and it also has the right to prevent in its inception a student riot and prevent students from taking over and damaging buildings on the campus.[29] Yet, it must pursue these duties with care and caution, lest its action result in a deprivation of civil rights, thus opening the college to civil actions at both law and equity.[30]

It is in the manifest interest of universities and students that freedom of expression be encouraged, that freedom of dissent be protected and that freedom from violent disruption be preserved. The universities and the students in their relations with each other can, will, and must meet this challenge of our times.

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22. Supra.

23. Supra.

24. Supra.

25. Supra.

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WANTED: ARCHITECTS FOR CONTINUED AUTONOMY

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The traditional, comfortable, and desirable autonomy of the academic bastion is under severe scrutiny. Newspapers are finding that campus activities, most notably violent disturbances, make excellent copy. National and local political leaders realize that this hitherto untouched area is a veritable gold mine, and they are getting a good deal of mileage out of it. What is not quite clear is what all this flurry, albeit a good deal generated by the institutions themselves, portends for the future of university autonomy in this country. I think a subtle shift is taking place today that will seriously affect institutional autonomy in the future. And, in so affecting autonomy, the move cannot fail to jeopardize the traditional freedoms that students, faculty, and administrators have come to take for granted.

The institutional autonomy historically accorded colleges and universities has its basis in age-old theories regarding the function and purposes of higher education. Because the universities were supposed to reflect the needs of the individual community, local control was deemed essential. In these days of huge universities, drawing upon the whole country for students and faculty and discharging their product not into the local community alone, but indeed the whole world, this concept may be outdated. For example, it has been thought that politics should be excluded from the institutional framework. While this was a commendable goal, the existence of military research, government funding, politically active students, and university control of large areas of real estate largely moots the question. Another concern that helped develop institutional autonomy was the notion that special administrators and rulemakers were necessary for the proper functioning of universities. While to some extent this remains true, no one can dispute the fact that the administrators and rulemakers of the contemporary institution have influence far beyond the ivy-covered walls and that the institutions in which they function are no longer comfortably isolated from the profanity of the "outside world."

While it may appear that because rationales for institutional autonomy have either disappeared or have been negated and thus the need for the independence has lessened, I think the contrary is true. We must not overlook the fact that the freedom of academic institutions is a prerequisite to the advancement of knowledge. Logan Wilson stated it very well when he said that "a sufficient degree of autonomy must be maintained for the institution's trustees, administrators, faculty, and students to exercise distinctive rights and discharge shared responsibilities. Such rights and responsibilities should be respected both internally and externally. In the realm of ideas, colleges and universities must be accorded the functional freedoms necessary for intellectual enterprise."[1]

So the answer is not to give up our autonomy; rather, it is to recognize our

new role and consistent with that new role and our traditional purposes, to cling jealously to what remains of our institutional autonomy, may, to find new ways to preserve the autonomy which we must possess. This challenge and change is not an easy one in view of the concurrent judicial expression of concern for preservation of constitutional rights for students on the campuses--particularly those rights contained in the Bill of Rights. I shall get to that issue specifically in a moment.

I have noted some of the conditions which have diminished our institutional autonomy. Let me suggest that there will be a further attack on what remains. What are some of the factors triggering this attack?

First, the current legal characterizations of the relationship between the student and the institution are simply anachronistic. Professor William Beaney has recently commented upon these so-called legal relationships.[2] Time does not permit me to treat this subject as comprehensively as he has, but let me briefly recall them for you.

Historically, we have described the legal relationship in our favorite Latin legalese as in loco parentis.[3] Can we, in 1970, pretend that we of the universities, either public or private, stand in the place of the students' parents? Can we continue to pretend that we make "homes" for some 7,000,000 college students in our inadequate, underfinanced university structures? But, even more to the point, can we, as surrogate parents, continue to think that this legal fiction is workable? Universities can expel a student before he is of legal age, a sanction not available to the real parent. I submit that except in a few isolated cases, this legal relationship in the context of a modern, over-populated society has been abandoned, in fact. We do not assume all the responsibilities incumbent upon natural parents, financial, personal, parental, and legal. None of us, assuming rationality, would consider such an undertaking.

Second, a theory of contract has been advanced.[4] It has been frequently described as a contract of adhesion: the Institution makes it and the students adhere to it. But contracts have reciprocal rights and duties. I think we can quickly dispose of this theory by asking which among us would be willing to stick to the courses, the hours, the places, the functions, and the benefits offered in our catalogs? We would be in the anomalous position of promising the student a relevant education, on the one hand, and being locked into a four-year straightjacket on the other. When, for instance, would we be able to offer environment control and pollution courses to the class which entered in the fall of '67? This whole area of the environment heated up to its present boil in a little less than three years. By relying on a contractual relationship with our students, we would be bound to what was in the catalog in 1967, thereby cutting down and restricting our flexibility: an undesirable circumstance.

Third, there has been some talk about a fiduciary theory applied to students and institutions, although this approach has not received the widespread consideration of the first two mentioned.[5] I, for one, have never been able to understand this theory until I applied that well-known legal principle assus backwardus. How can a self-supporting student be the beneficiary when he pays the trustee, the university, rather than the other way around? I should like to see this relationship litigated somewhere, anywhere, but please, not in Colorado! Besides, I think as universities we have enough to cope with now without the additional burden of this fiduciary's responsibility: The punctillio of an honor the most sensitive.[5a]

With these three legal relationships in mind, let me briefly set them for you on the college campus of today.

I do not need to cite specific examples. The colleges are full of protest and student objection to our current society, our current mores, our current politics, our economics, our foreign policy, our big business, the way we run our universities, and the kind of material we teach. As a matter of fact, on the flight out here, I gave this entire area some considerable thought, and I can't think of one damned thing these students don't object to!

And we have been indecisive in how to handle protest. Are we really parents protecting our young, or should we act as undercover agents to enforce our rules and regulations? At what point do we admit that we cannot handle a protest and call in the state authority? How on earth are we to handle the drug problem on our campuses? What kind of morality shall we overlook and what will we not tolerate? What is the status of our students? Are they adults, are they minors, are they somewhere in between, are they private citizens on a university enclave, or are they full citizens with constitutionally protected rights? The answers to these questions and others depend upon two things: the character of the student-institution relationship which a given institution adopts and implements, and how effectively that same university structures itself to deal with those problems clearly facing it--two parts to the same issue: what price autonomy?

It is discouraging to observe that universities have not given much thought to the character of internal student relationship; thus, the courts have imposed some guidelines on the question of the character of student-institution relationships, piecemeal. And, I suggest, the universities have not squarely faced the long-range question of how effectively the university can handle its daily problem. Prophetically, but not perpetually, the courts have not invaded this area--and I plead! Let it remain so. Accordingly, let us not lose by default. Instead, let us muster our intellectual resources and come out creating.

The judicial mandates in the student relationship field provide a framework in which we, the institutions, must begin to develop long-range plans. Students in public universities are beginning to be treated like full citizens. For example, the Court of Appeals for the Seventh Circuit has affirmed two district court decisions holding that Fourteenth Amendment due process requirements attach to students in disciplinary hearings at their universities.[6] Think of the impact! No longer can we in public universities limp along with disciplinary procedures that are anything less than full-blown, constitutionally prescribed due process proceedings, complete with specification of charges, notice of hearing, hearing, perhaps even counsel, and, of course, judicial review in the courts.[7] The student has come of age in our state universities. It is now beyond the time that we overhaul our institutional procedures to assure the student, as we ourselves demand certain constitutional protection. The old legal relationships earlier traced have been modified, at least, at the public institutions. Regardless of the legal theory chosen by a given institution, it is obvious that none of us heard the Constitutional warning bells; accordingly, the courts have imposed our duties upon us, in the public institution, initially. What might be the next steps which courts will take in the complacent and foresightless academic community?

These things have happened to the public institution: one step forward, two back. And what about private institutions? Here I can only look into my crystal ball which is no clearer than yours. If I were a betting man, a wager on the continuance of the distinction between public and private institutions would be like

betting on a slow horse in a fast race. Never mind about place and show, rely on this distinction, and we may never even finish!

The public-private university distinction was recently challenged in the Columbia University dispute.[8] There can be little doubt that it will be challenged again in the future on better, stronger grounds. We can expect, sensibly, that the courts will find, eventually, that the private college is clothed with state authority, or color of authority;[9] and thus, it will be treated identically with state institutions.[10] Are there any private colleges which do not receive state or federal aid in some form? And even if there are some completely private schools, in today's money situation, can they continue from private sources alone? If they can, I should like to see them after this meeting!

It is true that the courts have been reluctant to obliterate this line of distinction between public and private schools, especially in the area of disciplinary proceedings; but, I repeat that this distinction is a fortress that cannot be held.

Already the public-private distinction has been eroded or ignored in some cases involving First Amendment violations. One case has held that refusal of administrative officials to allow a Communist party member to debate with a John Bircher was not entitled to the usual administrative deference when First Amendment rights were at stake.[11] Another case has held that the university can deny use of its facilities for assemblies involving outsiders only if it can show that a threat of violence exists and that the threat arises mostly from the activities and presence of the outsiders.[12]

Let us pause for a moment to consider this diction. No longer are we free to just say "no" and have our discretion go unquestioned. We are now in the difficult position of trying to determine when a threat of violence exists and where it arises. In this area, there is little mention of public v. private institutions when First Amendment privileges are involved. My submission is that First Amendment privileges will be more uniformly protected than other constitutional areas and that the public-private distinction will be ignored when these rights have been invaded. It is also my belief that the courts will impose stricter standards on the institution in this area thereby decreasing our already diluted autonomy.

Again, the challenge to desirable institutional autonomy is real in view of our flagrant neglect of the mandates of the First Amendment and the tenacious continuing concern of the courts to protect those time-honored freedoms.

Item: Two recent cases involving the First Amendment on the campus.[13] It seems that the standard to be applied is whether freedom of expression presents an imminent threat of disruption and breakdown of orderly discipline,[14] or whether it poses an immediate and substantial threat to the necessary conditions of learning.[15] Gentlemen, look at the burden this imposes upon us. When does an assembly of young people become a "threat" to disruption and breakdown of orderly discipline? Can we act first and reason later to prevent violence, or will we be held accountable to some unascertainable standard before taking preventive action? Further, we are no longer free to act and have the action fall under the umbrella of administrative discretion.

Now we come to the close question. Most of these cases involve demonstrating students who are later disciplined by the institution. Is the court protecting Fourteenth Amendment due process as the end, or is the court really using the due

process requirements to protect the First Amendment right to assemble?[16] The answer to that question would shed light upon my earlier statement that the public-private distinction is but a temporary refuge.

Is it not possible that failure by the institution to protect against impingement on First Amendment freedoms could shock this whole area into the protective arms of the Constitution? Previous interpretation has shown us that the First Amendment has a broad girth. Rights need not be found in the express language of the First. Indeed, they may be found in its penumbra.[17] And even if these rights cannot be found in the scripture of the First, might they not be found elsewhere? Remember U. S. v. Guest[18] and a right of freedom of travel so fundamental in our Constitution that it need not even be written down? So, the question, gentlemen, is whether the public-private distinction can fend off First Amendment attacks.[19]

The point, I think, is clear. For the moment, the courts are willing to make a distinction between public and private institutions, especially in disciplinary areas. But inroads are being made, and this distinction is being eroded. Will the court preserve this distinction where First Amendment rights are involved? Will the state authority or color of authority requirement be strictly or expansively construed? Does the First Amendment, by its very nature, impose additional burdens upon university administrators? Will we have any autonomy left?

I cannot emphasize enough this tenuous public-private distinction. It is in this crumbling fiction that we may see the stark reality of our shallow rationalization of the pesky problem: autonomy.

Further items: an early case held that since education is a public function, private institutions are agents of the state and subject to constitutional restraints.[20] Another case has held that private universities remain so regardless of the amount of governmental aid.[21] We may well be in that in-between period before our universities become characterized as public institutions. This may be the last citadel of institutional autonomy. But, regardless of the prognosis, the time is upon us to act. We must re-examine, revise, and regear our universities if we are to preserve what little autonomy remains to us.

A final factor triggering attack on our institutional autonomy is state involvement in university affairs. Some thirty-six states have considered legislation related to campus disorder and discipline. Of this number, twenty have passed legislation directly affecting both student rights and university autonomy, and ten have defeated, vetoed, or ruled as unconstitutional such legislation. The remaining six still have the legislation under consideration.[22]

The question finally comes to why these legislative inroads are being made into traditional areas of university prerogative. I suggest there are several answers, none of which is independently sufficient to justify the movement, but which, taken as an aggregate, more than adequately gives the legislators the necessary impetus.

Public opinion has been aroused to the point where the lawmakers are listening. The taxpayers and alumni are seeing universities act and react in a way that they never expected nor now welcome. Much of the public views the university as an enclave, a four-year haven that will educate and protect its children much the way parents educated and protected their children while they were growing up. The public may have expected panty raids and beer parties--this it could live with;

but drugs, sex, Communism, and riots today's public cannot stand. Legislators, in addition to being exhorted to do something about this situation, realize that they have a real political football in their midst. They can make the most of the situation and fear little retaliation from non-voting students. In fact, the constituents who put them in office in the first place would be overjoyed.

In addition to these outside pressures, there is a growing feeling within the universities that these new laws are in reality quite fortuitous. Large universities have a tremendous administrative burden as it is. To rid themselves of this additional thorn in their side is a welcomed intervention. Cumbersome disciplinary codes and procedures would gladly be scrapped by some academic administrators in order to let local authorities handle the problems more efficiently and perhaps, more effectively.

All of this meandering around the legal vineyard leads to a clear non-legal conclusion, the first and topic sentence of these remarks: the traditional, comfortable, and desirable autonomy of the academic bastion is under severe scrutiny.

Autonomy is a tradition, whether comfortable or not (and today it is not, probably), which is highly desirable in the academic setting. Indeed, it is freedom of the academic institution that is prerequisite to the development and advancement of knowledge. Thus, it is time that we, the guardians of the academy, awake to the threat and challenge of a potential loss of autonomy.

For years, universities have sought the most competent architects to build the physical structures housing institutional activity. The deeper and more pervasive structure of internal university organization (and the structure of relationship between the academic institution and society) has not been modified by parallel experts, if indeed this structure has been considered a matter requiring periodic repair, replacement, and even rebuilding, at all.

Constantly the university must be aware of what it is supposed to be doing and constantly reviewing its structure for accomplishing those objectives. Necessarily, this internal review must be on the matrix of the goals and implementing rules (notably the U. S. Constitution) of the society. To date, monitors of the relationship of the institution to the legal culture, University Counsel, have preoccupied themselves with intricate distinctions in tax laws, zoning regulations, and property ownership. They have not looked, nor been asked to look, at the larger, more encompassing long-range problems. Without the advice of these experts, there have been experiments with ombudsmen, men-at-large, and the like. Yet, there has been no systematic examination of the private legal system, which must exist on the campus, consistent with Constitutional, statutory, and common law guidelines. What I suggest we need, to assure necessary autonomy in the academic institution, is some concern about architects of order and change, architects of continued autonomy. This is the constitutional challenge, mainly presented by the First Amendment, which should preoccupy our conversations today.

REFERENCES

1. Wilson, "Campus Freedom and Order," 45 Denver Law Journal, 502, 504.

2. Beaney, "Students, Higher Education, and the Law," 45 Denver Law Journal 511 (1968).

3. Id. at 513-17.

4. A recent case involving the application of contractual principles to the relationship between a private university and one of its students termed acceptance of the contents of the entire bulletin a sheer fiction. See Drucker v. New York University, 57 Misc. 2d 937, 293 N. Y. S. 2d 923 (1968).

5. Goldman, "The University and the Liberty of its Students - A Fiduciary Theory," 54 Kentucky Law Journal 643 (1966).

5a. Meinhard v. Salmon 249 N. Y. 458, 464 164 N.E. 545, 546 (1928).

6. Soglin v. Kaufman, 418 F. 2d 163 (7th Cir. 1970) and Strickland v. Regents of the University of Wisconsin, 297 F. Supp. 416 (D. Wis. 1969).

7. Specification of charges, notice of hearing, and hearing all come from Strickland v. Regents of the University of Wisconsin, 297 F. Supp. 416 (D. Wis. 1969). The case of French v. Bashful, 303 F. Supp. 1333 (E.D. La. 1969) suggests that in some instances the student may have counsel as a right.

8. Grossner v. Columbia University, 287 F. Supp. 535 (S.D.N.Y. 1968). See also Powe v. Miles, 407 F. 2d 73 (2d Cir. 1968) and Browns v. Mitchell, 409 F. 2d 593 (10th Cir. 1969).

9. Guillory v. Administrators of Tulane University, 203 F. Supp. 855 (E.D. La. 1962) but cf Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967).

10. Other areas of presumably private concern have been swiftly characterized as having State connections substantial enough to attach constitutional rights and duties. See
Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U. S. 308 (1968); Reitman v. Mulkey, 387 U. S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967); Evans v. Newton, 382 U. S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966); Griffin v. Maryland, 378 U. S. 130 (1964); Burton v. Wilmington Parking Authority, 365 U. S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961); Pennsylvania v. Board of Trusts, 353 U. S. 230, (1957); Barrows v. Jackson, 364 U. S. 249 (1953); Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948); Marsh v. Alabama, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946). See also Dixon v. Alabama State Board of Education 294 F. 2d 150 (5th Cir. 1961).

11. Dunbar v. Governing Board of the Grossmont Junior College, 79 Cal. Reptr. 662 (D. C. App. 1969).

12. Clemson Univ. Vietnam Moratorium Committee v. Clemson Univ., 306 F. Supp. 129 (1969).

13. Norton v. Discipline Comm. of E. Tenn. State Univ., 419 F. 2d 195 (6th Cir. 1969) and Tinker v. Des Moines Independent Community School District, 393 U. S. 503 (1969).

14. Norton v. Discipline Comm. of E. Tenn. State Univ., 419 F. 2d 195 (6th Cir. 1969).

15. Tinker v. Des Moines Independent Community School District, 393 U. S. 503 (1969). This is a particularly interesting area in that the courts may be

developing a new criterion for first amendment violations. It seems that the traditional clear and present danger test announced in Schenck v. United States, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919) and explicated in Dennis v. United States, 341 U. S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951) and the advocacy of action test in Yates v. United States, 354 U. S. 298 (1957) may not, as indicated in the text, be the criterion applied to first amendment problems on the campus.

16. This should not be confused with the court's technique of using the fourteenth amendment as the vehicle to attach amendments to the States. See Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925) "For present purposes we may and do assume that freedom of speech and press which are protected by the First Amendment from abridgment by Congress - are among the fundamental personal rights and liberties protected by the Fourteenth Amendment from impairment by the States." The question framed in the text is which end the court is protecting, due process of freedom of speech, right to assemble?

17. Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

18. 385 U. S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966). See also Shapiro v. Thompson, 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).

19. Here I am refering to the sliding scale the court in Schenk seemed to set up. The scale afforded a low degree of judicial protection to speech which is highly emotional and has the effect of force and advocacy of action, and a high degree of judicial protection to speech involving ideological content such as political ideas, debates, etc. Most of our campus problems focus on political problems as noted in the beginning of this paper. Therefore, the court may be more willing to attach first amendment privileges and protections to the students regardless of the nature of the institution, whether it is private or public.

20. Guillory v. Administrators of Tulane University, 203 F. Supp. 855 (E.D. La. 1962).

21. Greene v. Howard University, 271 F. Supp. 603 (D.D.C. 1967).

22. Johnson, "State Legislation on Campus Disorders," 15 Student Lawyer J. 24 (March 1970).

STUDENT DISCIPLINE AND DUE PROCESS

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There is a continuing need for all involved in the business of higher education to know the legal parameters within which decisions may be made. Especially, is this need great in these times.

In the past decade we all have heard much concerning due process and the college campus - especially in the area of student discipline. Somehow the notion in the minds of many has been that due process entails, in addition to treating a student fairly, the handcuffing of the administrator.

Students should be treated fairly and justly. Surely in an institution of higher learning which is dedicated to seeking the truth in an open free marketplace of ideas, fairness and justice for all should prevail.

It is true that administrators in some instances have bent over backwards in their efforts to please students and others, in the name of due process, even though some of those students and others are not really interested in due process but rather in the destruction of not only the free marketplace of ideas but our present society as well. And they would replace it with nothing more than anarchy.

Due process does not require administrators to allow protesters to materially disrupt the lawful on-going activities of the school, nor to interfere with the rights of others, nor finally to close down the institution.

In the absence of an extreme emergency, a society which allows the free marketplace of ideas to be intimidated and closed by a few bent upon destruction of that free marketplace is a society that has lost its perspective and its will to maintain real freedom for all. And that society will soon reap an ever increasing harvest of further destruction of its institutions. The individual college or university cannot offer any real durable relief to some of the demands of protesters. This makes the job of administration more frustrating and difficult. But if the institutions do not maintain order and freedom, then the community will move in, and the results may be unfavorable to a free marketplace of ideas.

In discussing student discipline and due process I will first explore the nature of discipline and of due process and attempt to set forth the requirements for due process in disciplinary proceedings in higher education based on court decisions. Also I will touch upon equal protection and judicial intervention in scholastic affairs.

Nature of Discipline in Higher Education

Student discipline may be viewed as a part of the learning process--the instruction of the students. It may be viewed as a guidance function which attempts to lead the student in the proper direction dictated by the institution's purposes. It may also be viewed as completely divorced from the academic process with no relationship to or bearing on the instruction of students.

In the most severe of discipline cases, the student may suffer irreparable harm to his future. Since this becomes a part of his record, he may be refused admission to another institution and may be harmed socially and economically. For these reasons, administrative proceedings should be fair and reasonable. However, when the preoccupation with the student offender and his rights becomes so great as to interfere with the overall purpose of the institution, there must be a weighing of the individual right against the purposes and the good of all concerned.

Due Process

The Fifth Amendment to the United States Constitution states that "No person ...shall be deprived of life, liberty, or property, without due process of law...." This amendment applies to the Federal Government. The Fourteenth Amendment to the Federal Constitution applies to the states and reads: "...nor shall any State deprive any person of life, liberty, or property, without due process of law...."

Definition of Due Process

There is no absolute and final definition of due process of law. Courts have refused to formulate a precise definition and have preferred to define it "by the gradual process of judicial inclusion and exclusion."[1] In general it may be said that due process is met when the principles of fair play are invoked and when actions are reasonable, just, and not arbitrary.

There are two kinds of due process--procedural and substantive. Procedural due process refers to the procedures and methods employed in seeing that laws and regulations are carried out and enforced.

Substantive due process goes to the very heart of the law or regulation in question. It questions not merely the procedures and methods employed in any proceeding, but whether the purpose of the law or regulation is fair, reasonable, and just.

History of the Due Process Approach in Student Disciplinary Proceedings

Student disciplinary proceedings have been held to be civil and not criminal proceedings and therefore do not necessarily require all of the judicial safeguards and rights accorded to criminal proceedings.[2]

In 1961 a landmark decision in the area of due process and student disciplinary proceedings in public higher education was handed down in Dixon v. Alabama

State Board of Education.[3] In that particular case the Court upheld the contention that adequate notice and hearing must be afforded a student prior to expulsion or long term suspension. Since that historic case, the courts have weighed the merits of each case to determine due process and have used the gradual process of "judicial inclusion and exclusion" to make that determination.

Specificity of Rules

Although it is impossible to cover every conceivable situation in a set of rules pertaining to students, due process requires that there should not be undue vagueness or overbreadth in the rules governing students. The degree of specificity of the rules will, of course, vary. Colleges and universities have not been required to have specific rules and regulations to the extent necessary in criminal statutes. However, "misconduct" as a standard for disciplinary action has been held unduly vague and overbroad. In Soglin v. Kauffman the Court concluded:

> Pursuant to appropriate rule or regulation, the University has the power to maintain order by suspension or expulsion of disruptive students. Requiring that such sanctions be administered in accord with preexisting rules does not place an unwarranted burden upon university administrations. We do not require university codes of conduct to satisfy the same rigorous standards as criminal statutes. We only hold that expulsion and prolonged suspension may not be imposed on students by a university simply on the basis of allegations of "misconduct" without reference to any preexisting rule which supplies an adequate guide. The possibility of the sweeping application of the standard of "misconduct" to protected activities does not comport with the guarantees of the First and Fourteenth Amendments. The desired end must be more narrowly achieved.[4]

In Esteban v. Central Missouri State College[5] the Court approved rules expressed in general rather than in specific terms and contrasted these rules with criminal statutes. In expressing this approval the Court stated:

> We see little basically or constitutionally wrong with flexibility and reasonable breadth, rather than meticulous specificity, in college regulations relating to conduct. Certainly these regulations are not to be compared with the criminal statute. They are codes of general conduct which those qualified and experienced in the field have characterized not as punishment but as part of the educational process itself and as preferably to be expressed in general rather than in specific terms.[6]

The Federal Court in Scott v. Alabama State Board of Education[7] seemed to set forth the general standard in this area. That standard is that the degree of specificity required is that which allows a student to adequately prepare a defense against the charge.

Notice

In any serious case of student discipline where the penalty may range from extended suspension to expulsion, due process requires that the student be given proper notice and opportunity for a hearing.[8] In general it may be said that a student must be given, at a time reasonably prior to the proceedings, a written statement in which the charges are explicitly set forth as well as the specific ground or grounds which, if proven, would justify the penalty under the lawful regulations. Included in the notice should be the names of the witnesses who will testify against him and the facts to which each witness testifies. It should be stressed that proper notice may vary with each case. The element of fair play does dictate, however, that the student know, in advance of the proceedings, what he is being charged with and the grounds upon which the charges are based. Also, the possible punishment or penalty should be included in the notice.

A student cannot frustrate the notice process by failure to keep the institution informed of change of address and by subsequent failure to actually receive the notice. Nothing more is required of college officials than that their best efforts be employed to give written notice.[9]

Hearing

What constitutes a hearing in disciplinary cases may vary with the circumstances of each case. In Dixon v. Alabama State Board of Education the Court said:

> The nature of the hearing should vary depending upon the circumstances of the particular case.... By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses.
> In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved.
> This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required.
> Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interest of the college.[10]

Since courts have allowed flexibility in disciplinary hearings held by college officials, there has been no requirement that these hearings must be "public."[11]

The hearing need not be allowed to degenerate into a circus atmosphere with the proceedings carried on in a large auditorium filled with cheering partisans.

Confrontation and Cross-Examination of Witnesses

The right to confront and to cross-examine witnesses is secured by the Sixth Amendment to the United States Constitution in criminal proceedings. Since student disciplinary proceedings in higher education have not been deemed criminal proceedings, there is no general right to confrontation and cross-examination of witnesses.

Right to Counsel

The United States Supreme Court has recently extended the right to counsel to juvenile proceedings in cases where the juvenile may be committed to an institution.[12] This right to counsel has not been extended to student disciplinary cases. The Court specifically ruled such in Barker v. Hardway.[13] Both the Federal Court of Appeals and the United States Supreme Court affirmed Barker v. Hardway without an opinion. However, in French v. Bashful[14] the Court ruled that where a state supported university proceeded through counsel at the disciplinary proceeding, the student defendants were at a great disadvantage by being denied counsel. The Court did not extend the right to counsel to all students in every disciplinary proceeding, but it did distinguish this case and the unusual circumstances therein. It should be pointed out that in most of the court cases involving student disciplinary proceedings, the students have been given the right to counsel.

Self-Incrimination

There is no general rule that a person subject to disciplinary proceedings in higher education can refuse to answer questions under any and all circumstances.

In Ferutani v. Ewigleben[15] the Court ruled that college officials are not compelled to allow students charged with unlawful actions on campus to remain in school or to postpone any expulsion hearings pending completion of state criminal proceedings even though the students may express a fear of loss of the Fifth Amendment's self-incriminating rights in the proceedings. The Court stated that adequate self-incriminating rights would prevail in any subsequent criminal trial resulting from testimony given at the expulsion hearings.

Rules of Evidence

There are no precise rules of evidence to be followed in student disciplinary proceedings. Rules of evidence which apply in criminal proceedings, such as the hearsay rule, are not applicable. Courts have not set forth specific rules, nor are they likely to do so.

Trial by Jury

Since there has been no declaration by any court that student disciplinary proceedings constitute any manner of criminal proceedings, there is no right to a trial by jury. The concept of a trial by jury incorporates the idea of judgment by one's peers. Certainly, allowing students to constitute a part or all of a disciplinary committee is left to the individual college or university unless

prohibited by law.

Interim Suspension

Many colleges and universities have felt the need to employ an interim suspension of students in order to maintain order and freedom on the campus. The rationale for an interim suspension cannot be "guilt." The only valid rationale for such suspension is that the continuing presence of the student on campus constitutes danger to that individual and/or others or property. There must be a quick hearing, probably within one to three days, in order to allow the student an opportunity to show that his presence does not constitute a danger. In Stricklin v. Regents of University of Wisconsin the Court declared:

> Unless the element of danger to persons or property is present, suspension should not occur without specification of charges, notice of hearing, and hearing. The preliminaries to the hearing and the hearing itself should constitute...a "full hearing": that is, a procedure which affords all of the elements of due process which must constitutionally precede the imposition of the sanction of expulsion or the imposition of the sanction of suspension for a substantial period of time.
>
> When the appropriate university authority has reasonable cause to believe that danger will be present if a student is permitted to remain on the campus pending a decision following a full hearing, an interim suspension may be imposed. But the question persists whether such an interim suspension may be imposed without a prior preliminary hearing of any kind. The constitutional answer is inescapable. An interim suspension may not be imposed without a prior preliminary hearing, unless it can be shown that it is impossible or unreasonably difficult to accord it prior to an interim suspension. Moreover, even when it is impossible or unreasonably difficult to accord the student a preliminary hearing prior to an interim suspension, procedural due process requires that he be provided such a preliminary hearing at the earliest practical time.[16]

Only the facts in each case can determine if it is actually impossible or unreasonably difficult to hold a preliminary hearing. It is clear, however, that a preliminary hearing must be held at the earliest practical time.

Equal Protection

As in the case of "due process of law," "equal protection of the laws" is most difficult to define. There can and must be reasonable classification made under laws. A rule which is fair on its face may be discriminatorily applied so as to deny to an individual the equal protection of the laws. However, in order to show that there has been a violation of "equal protection" there must be proof of an "intentional or purposeful discrimination" between persons or classes.[17] Courts have allowed reasonable classifications since it is impossible that every law apply to every citizen in exactly the same way.

In student disciplinary proceedings, higher education authorites have always reserved the right to treat individuals as such and mete out punishment accordingly. In Zanders v. Louisiana State Board of Education[18] the Court held that college officials are not relegated to dismissal of an entire student body or a large portion thereof in order to stop illegal activity and restore order on their campus, especially when the instigators or leaders of the activity can be definitely identified and removed. The Court further held that leaders who organize and instruct others to engage in unlawful activities are subject to expulsion just as if they had physically participated in the unlawful activity.

Students cannot act as a group and then subsequently complain if they are tried or disciplined as a group. In Buttny v. Smiley[19] students locked arms in an attempt to keep other students and persons out of a building in which the Central Intelligence Agency was recruiting. They were suspended indefinitely, and they complained that they were dealt with as a group and not as individuals. This was not a violation of a constitutional right, so the Court said.

College and university rules restricting certain hair styles and beards have been held in violation of equal protection in the absence of a relationship to health, welfare, morals, or discipline of any student.[20]

The U. S. District Court for the Western District of Missouri affirmed that different standards, scholastic and behavioral, may be established for different divisions, schools, colleges, and classes of an institution if the differences are reasonably relevant to the missions, processes, and functions of the particular divisions, schools, colleges, and classes concerned.[21]

Scholastic Affairs

The doctrine of judicial nonintervention in scholastic affairs is followed by the courts. Courts are most reluctant to pass judgment in this area, and they have refused to interfere unless the most extreme circumstances are present.

In Connelly v. University of Vermont and State Agricultural College, the Court reviewed the case law in the area of judicial intervention in scholastic affairs and said:

> The effect of these decisions is to give the school authorities absolute discretion in determining whether a student has been delinquent in his studies, and to place the burden on the student of showing that his dismissal was motivated by arbitrariness, capriciousness, or bad faith. The reason for this rule is that in matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other noneducational tribunals. It is only when the school authorities abuse this discretion that a court may interfere with their decisions to dismiss a student.[22]

Procedural due process has not been required by any federal or state appellate

he is fully aware of all of his rights and he does indeed waive such.

If appropriate institution officials feel that an interim suspension must be employed in order to maintain order and freedom on the campus, they should do so only if there is evidence that the continuing presence of the student on campus constitutes danger to that individual and/or others or property. There must be a quick hearing, probably within one to three days, in order to allow the student an opportunity to show that his presence on campus does not constitute a danger.

5. The student should be given a written report of the result and findings of the hearing.

6. If the hearing is not before the ultimate administrative authority of the institution, than an appeal procedure before that body should be made available.

Conclusions and Recommendations

In conclusion I believe that colleges and universities should first determine their lawful aims and purposes. Secondly, they should determine the rules, regulations, and standards necessary for the implementation of those aims and purposes. And thirdly, they should then make them known to all comers. And finally, college and university officials should enforce them--fairly and justly--ever realizing that students do not shed their constitutional rights at the campus gate nor do they acquire any special privileges.

As higher education administrators face student disturbances on the campus, I would recommend that they not overact. It is best to talk first and then act. But there should be no hesitancy to act one it is evident that talk will not ease the situation. The longer students are illegally occupying a building the more established and solidified their support becomes. Their occupancy then takes on a kind of de facto legitimacy, and there is an increase in their moral certainty of the righteousness of their cause.

For any government or duly constituted authority to condone any illegal disobedience is like taking inside from the cold a seemingly harmless jungle kitten which will surely grow into a ferocious lion that will destroy and devour a free institution and a free society as well.

Unquestionably the college or university administrator is laden with tremendous responsibilities and pressures the likes of which have not before been a part of the position. However, there are also attached to the position tremendous opportunities to help shape an institution in order that each student is given the atmosphere and opportunity to proceed in his educational development to the fullest extent of his capacity and potential. To maintain order, but yet freedom, on the campus, thus enabling the free marketplace of ideas to survive, is not only the greatest challenge faced by college and university administrators, but is indeed a prerequisite to a free society as well.

court in dismissal proceedings based upon scholastic standards.

Up to this time there has been confrontation between students and the administration. In the future I would predict the confrontation will increasingly be between students and the faculty concerning scholastic affairs. Academic freedom will indeed be examined with the same scrutiny as has been given administrative policies and decisions.

Guidelines

I would like to give some summary guidelines that I feel are appropriate in meeting due process in student discipline. They are as follows:

1. All rules, regulations, and appropriate standards of conduct, both scholastic and behavioral, should be stated in the college catalog and student handbook, if one exists, and should be made available to each student at the time of his application for admission or, if not feasible at that time, certainly no later than his official matriculation. These rules, regulations, and standards should be relevant to the lawful aims and purposes of the institution and should not be unduly vague or overly broad in scope.

2. No disciplinary action should be taken on charges (or grounds) which are not supported by substantial evidence.

3. Written notice should be given the student which would include the follwoint: A written statement of the specific charges and possible punishment or penalty, and the grounds which, if proven, would justify the expulsion or suspension under the rules, regulations, or standards of the institution. The notice should contain the names of the witnesses against him and a report on the facts to which each witness testifies. The date, time, and place of the hearing should be stated in the notice. The notice should be given to the student at a time reasonably prior to the date of the hearing in order to allow the student time to prepare his defense.

4. An opportunity for a hearing before the appropriate administrative adjudicating body should be afforded which should include the following: the student should be given an opportunity to present his own case or defense against the charges. He should be given opportunity to present witnesses or testimony in his behalf.

The institution may or may not, according to the circumstances and in keeping with its lawful aims and purposes, follow any of the procedures for a full-blown adversary proceeding (legal representation, public hearings, confrontation and cross-examination of witnesses, warning about privileges, self-incrimination, application of principles of former and double jeopardy, compulsory production of witnesses, rules of evidence, and any of the other features of criminal proceedings). Each institution can best determine the procedures that it will follow. No court has required that any of these procedures be made mandatory in all disciplinary proceedings.

If the student chooses to waive the hearing and accept the punishment or penalty without contesting it, he should sign a written waiver which states that

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THE CAMPUS AND THE COMMUNITY: PROBLEMS OF DUAL JURISDICTION

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"The Campus and the Community: Problems of Dual Jurisdiction" is an assigned topic designed to mesh with, to complement, the topics considered in this conference. In such a circumstance it would perhaps have been more appropriate had I sought specific guidance from those who planned this meeting concerning a detailed outline of what I was expected to cover. But I have not done so for several reasons, including the fact that early in my own planning, I determined broadly what I thought ought to be said, and I did not want to prejudice my opportunity to say it. In other words, if you want to do something that is not specifically forbidden, don't ask--do it. Those of you who have been in service will know what I mean.

Some of you who are my colleagues in legal education may be aware that for some years I have had a special interest in the jurisdiction and operation of the federal courts, and of course, a major aspect of any study of the federal courts involves consideration of the overlapping or dual jurisdiction of the federal and state judicial systems. It might be expected that one with such a background asked to speak on "The Campus and the Community: Problems of Dual Jurisdiction" might well see a parallel with "the state and federal courts: problems of dual jurisdiction," and undertake to draft a code dealing with as many specifics as possible.

The American Law Institute a year ago completed a massive study on the division of jurisdiction between the federal and state courts. Literally thousands, perhaps tens of thousands, of hours were spent by a very substantial number of people in drafting and debating the sections which would at some propitious moment be proposed as amendments to the United States Judicial Code. The product is a superb one if you happen to agree with the premises on which it is based. But if you don't agree, then you must necessarily question the validity of the results.

For example, a major portion of the jurisdiction of the United States District Courts is the diversity jurisdiction. This permits with certain stated exceptions a person who is a citizen of one state, who has a claim against a citizen of another, the value of which exceeds $10,000 exclusive of interest and costs, to file his action in a United States District Court rather than in a state trial court where one might normally expect it to belong. The provision for diversity jurisdiction is contained in the Constitution and was incorporated in the first Judiciary Act of 1789. Although there is debate still on the subject, most scholars are convinced that the provision was originally included because of an assumed prejudice which state courts, or rather state judges and jurors, might evidence against out-of-state litigants, whether plaintiffs or defendants.

Assuming that this was a fact of life in the late 1700's, it does not neces-

sarily follow that it is a fact of life today. I do not believe that it is. But it is undenied that the diversity jurisdiction has been abused, and everyone that I have heard comment on the subject agrees that certain reforms are in order. The question is the degree of reform.

I happen to believe that whatever parochialism may exist in state courts will also exist in federal courts in the same community. My own judgment is that it is insufficient to worry about, at least to the extent of having a highly specialized jurisdiction in the federal courts. And so were I drafting an amendment to the Judicial Code, I would eliminate the diversity jurisdiction, except upon an actual showing of local bias or prejudice. So with this basic difference in premise, I could not participate meaningfully in the ALI study.

In the same manner I think there is no point in our attempting to develop a "code" to resolve any problems of dual jurisdiction between the campus and the community, unless and until, we have some broadly based agreement on the premises, or the foundation, upon which we are to build. I would like to devote myself to those premises.

What I have to say is certainly not unique, nor will you find it unusual. What I am attempting to do is to articulate those premises which seem sound to me, many of which I am certain have broadly based support.

There is no question that both the campus and the community are very concerned about student protest especially violent protest, and they are testing their jurisdictional muscles in attempts to contain that protest within acceptable limits. By campus, I mean all institutions of higher learning, universities and colleges alike. By community, I mean not only a community like Athens, Georgia, which is so intimately related to the University, historically, geographically, economically and in every other way, but the much broader community of alumni, taxpayers, and citizens in general.

To begin with, I suggest to you that to justify the granting and exercise of jurisdiction to enact rules of conduct and to punish violations of them, an entity must have a recognized, legitimate interest to be protected. There can of course be no question that both the campus and the community have such interests. Consider first the campus and its interests as they may be affected by student protest. When that protest is on campus and is or threatens to be violent, the campus's interest first is the protection of persons and property, and secondly, the maintenance of an uninterrupted academic program and a condition of true academic freedom. And this is true whether the protest is against the campus itself or some aspect thereof, or against some external agency or problem.

It is regrettable that the protection of persons and property has to be emphasized in this context, because in a society of supposedly mature persons interested in the pursuit of knowledge, violence in support of an idea or in opposition to one should be unthinkable. Yet no one here needs to be told that in these days and times, this simply is not the case.

Similarly, it should not be necessary to discuss at any great length the interest of the campus--its obligation--to maintain a condition which permits the learning and research process to be continued without interruption. After all, this is the basic purpose of the campus. Unhappily to some (very few to my mind), student strikes, the occupation of administration offices, and the blocking of access to buildings are not only acceptable but perhaps even preferred tactics.

The community, too, has the necessary interest. If student protest does erupt in violence which spills into the streets of the community, the interest is direct and fundamental. Persons and property must be protected. But the threat need not be that direct for the community to have an interest. If there is violence on campus, there is always the possibility that it will spill over, and it could be argued that under these circumstances, the community has a very real interest in preventing the spill-over before it occurs. Additionally, since the campus is in reality a part of the community, the community has a supportive interest. If additional manpower is needed to handle violent protest, obviously the community must supply it in the persons of local police, state police, and national guard. Thirdly, the community, whether it be governmental in nature or otherwise, has established the campus for a specific purpose, and it supports the campus through taxes or gifts or both, and therefore has an interest (1) in the preservation of the physical assets of the campus, buildings and records, as well as the personnel thereof, faculty, students, and supporting staff, and (2) the continuation of the educational programs for which the campus was established and is being supported.

In essence then, we come to the premise that the legitimate interests of the campus and community are roughly the same. They include the preservation of persons and property and the continuation without unauthorized and unnecessary interruption and interference of the established education program.

This overlap of interest might well support, at least theoretically, a concurrent exercise of jurisdiction by campus and community. But I am convinced that a division of jurisdiction would be a more workable solution and that such a division ought to be attempted along geographical lines.

If the student in protest or otherwise, leaves the campus and commits an act of violence, I would leave the matter entirely within the hands of the community. The status of student, or faculty member insofar as that goes, should have no bearing at all if such a person commits an act of violence outside the geographic boundaries of the campus. The community should exercise its jurisdiction, and the campus limit its participation to the notification of parents or other appropriate persons and perhaps to assisting in arranging bail.

As for events on campus, I stand firmly for the proposition that the campus should exercise both initial and primary jurisdiction and that the community should become involved only in a supportive role and only upon specific request of the campus.

I am aware that there is considerable evidentiary support for the proposition that much campus disorder is fomented and exacerbated by persons who have no formal association with the campus, and for the moment I want to exclude them from the discussion, limiting temporarily my remarks to activities of faculty members and students on campus. These persons, faculty members and students, have presumably associated themselves with the campus for educational purposes. By accepting positions as teachers and administrators, or by matriculating as students, they have dedicated themselves to the search for truth at this time and place, and that search requires the free exchange of ideas, even unpopular ideas, even highly unpopular ideas. One who heckles a speaker or prevents him from speaking, one who interrupts or interferes with classes or the activities of the campus which support lectures and classes, that one violates the fundamental raison d'être of the campus. Interference with the educational process by physical violence including excessive sound is both anti-intellectual and unacademic, and the campus has an

obligation either to persuade those who would so interfere of the validity of the unimpaired free exchange of ideas or to exclude them from the campus. The latter, of course, has dangerous overtones since it may give the appearance of an improper suppression of dissent. Yet if the case is clear, it will stand investigations even by the most ardent advocates of academic freedom, and it will be supported.

But if ideas and reason do not prevail and violence seems probable or even imminent, campus personnel have the best chance of preventing it. The presence and high visibility of senior administrators and faculty members will, I suggest, have a very substantial defusing effect. This is not through any fear of confrontation or retaliation, but rather because of the respect which their offices and hopefully their persons carry and the sense of personal and institutional concern which is thus demonstrated. If there is protest, it ought to be heard. And the best way to demonstrate that it is being heard is for those who ought to hear to be obviously present at protest meetings.

The presence of student marshals, as distinguished from uniformed police, will have a similar effect. I am not now talking about the biggest and brawniest men on campus, those who can participate effectively in the suppression of violence; instead I am advocating the presence of leaders who are known and respected, who can be identified by and can talk with the protesters either on a group basis or on a man-to-man basis. It has worked elsewhere; it merits a sustained try anywhere.

If violence does erupt, the campus must be prepared to handle it, and that handling may involve at least the local police in a supportive role. But the mere presence of "outside forces" on the campus is in and of itself inflammatory and ought to be avoided. These "outside forces" ought never to be on campus unless the campus administrators, in the exercise of their primary jurisdiction, seek support, and these "forces" ought always to be under the direct control of the campus.

After violence on the campus, I am of the opinion that the campus itself, speaking through its chief officers, should determine in every instance whether prosecutions for on-campus conduct should be initiated. I firmly believe that insofar as circumstances permit, discipline should be handled on and by the campus itself. The community should become involved in support only when the need is real.

Where students are concerned, in most instances student disciplinary procedures can be utilized. In cases of arson or attempted arson, for instance, I sould concede that this is not adequate, and the jurisdiction of the community must be invoked. Faculty members present a different problem; but it is, in my judgment, a minimal one since most of them, in fact, stop short of participation in violent protest.

This leaves those not formally associated with the University who may well be involved. If my premise of primary jurisdiction based upon geography is sound, it would follow that the campus has the primary jurisdiction over them as well, and it should exercise that jurisdiction by preventing or terminating the violence of such persons with the support of the community if necessary. At this point as a matter of law in most places, the primary jurisdiction of the campus over these persons terminates, and it thereafter resides with the community. I think this is wise, and at this point, the community must decide whether to prosecute for violation of local or state laws. In a real sense the campus thus rids itself of those not formally associated with it and turns them over to the companion jurisdiction for such action as it deems fit to take.

It is very apparent that there is within the community, using that word in its broadest sense, a growing disenchantment and disillusionment concerning student protest. In part, this may be caused by a failure on the part of the campus to exercise effectively its primary jurisdiction and responsibility. In part, I think it is caused by a longing for a national tranquility, a corporate peace of mind, which we probably have never had and probably never will have.

It is also caused, I believe unhappily, in part by the basic philosophy of a relatively small group of people who strongly believe that if someone doesn't like things as they are at a particular place and time, he should go somewhere else. This type of person is also anti-intellectual, and he, too, along with the dissenting student who is willing to resort to violence, needs to understand what the campus is all about. He needs to understand that it is highly unlikely that truth can be discovered by those who are permitted to look only in one direction and that suppression of non-violent dissent destroys the institution which has fostered and nourished the ideas out of which has come the most satisfactory (or perhaps the least unsatisfactory society in all history). But it is inconsistent at the least to expect one like this to understand the purpose of the campus if some of the campus residents themselves either do not understand it or do not act in accordance with their true understanding.

This disenchantment and disillusionment is resulting in the exercise of more and more centralized control, more and more control away from the campus itself. It is resulting, according to reports, in the enactment of campus regulations as local ordinances or state statutes making them enforceable as an initial proposition by the community. Our local grand jury has been reported in the paper as having recommended that this University's regulations be converted into such laws so that they would be enforceable against all who violated them, including very specifically and obviously intentionally those not formally associated with the University who participate in disruptive tactics. It is not clear whether the grand jury contemplates a formal judicial structure within the campus to handle such matters; but in all events, if the effect were to convey primary jurisdiction on campus to the community, I would oppose it.

There need be no conflict between the campus and the community in the exercising of an admitted dual jurisdiction. The community needs to understand the purpose of education, and therefore, to tolerate, even to encourage the non-violent expression of ideas--in some instances, protest. The campus needs to take those steps which minimize the risk of violence or eliminate it altogether, while preserving the right of free expression so necessary for true education and a democratic society.

STUDENT PROTEST AND DISCIPLINE AT PRIVATE INSTITUTIONS

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Thoughts of protest and confrontation stir up considerable uneasiness among college administrators today, particularly college presidents and student personnel workers. I'm certain we could exchange many unnerving experiences on these subjects, but I suggest to you that there has been at least one positive aspect of protest and confrontation, namely, an awakening of the academic world to the possible legal implications in higher education. The main thrust has been in the realm of student-institutional relations, with the emphasis on discipline. The current court decisions have provided insights into future legal developments.

Although the primary catalytic agent has been judicial decisions, other elements have been a part of the total formula. Add such elements as governmental intervention by the executive and legislative branches of both the federal and state governments and legal activities of ACLU, NSA, ASG, and AAUP. These active elements, coupled with recent self-examinations by universities and student pressures, have given rise to a body of law that might appropriately be termed "educational law." Until about two years ago, university administrators had been reluctant to view educational problems from a legal perspective. Today, with the prospect of confrontation and the assertion of determined legal rights, we have no alternative but to acquire some layman's legal knowledge. Unfortunately, this area is an unsettled one, and definitive answers to some legal questions have not yet been provided. I will attempt to highlight legal developments affecting private institutions and to acquaint you with legal pitfalls in their broadest sense.

As a starting point, let us briefly examine some of the legal theories generally applied to student-institutional relationships. The traditional concept of in loco parentis and the theory of contractual relations with regard to public institutions were discarded in 1961 by the landmark case of Dixon v. Alabama. As you recall, this case dealt specifically with a public institution; it introduced the constitutional rights approach of student university relations. This decision granted the first major recognition of civil rights for minors. This decision should set the tone for future dealings with students of all types of institutions - one of mutual respect for human rights.

Of all these theories, in loco parentis, contract, fiduciary, and state action, the one most frequently urged even against private institutions is the latter. I presume that the previous speakers have aptly acquainted you with the legal basis of this theory in their discussion of decisions affecting student rights. Proponents of this theory have attempted to import all of the individual's constitutional rights to the campus on the grounds that the university's (even private universities) activities constitute state action, thus subjecting the univer-

sity to the 14th Amendment. Many legal scholars argue that this will be a successful rationale in cases against private institutions, but there are no hard and fast decisions to completely support this argument. The original case in which this theory was advocated was Guillory v. Tulane. The district court concluded that Tulane University had state involvement sufficient to subject it to the requirements of the 14th Amendment. The state involvement consisted primarily of tax exemption for certain endowment properties, ex-officio memberships on the Board of Administrators for public officials, and the privilege of awarding tuition-free scholarships by state legislators. On rehearing before a different judge, the case was reversed. In Greene v. Howard University it was held that Howard University was not a governmental body but a private corporation despite a large degree of federal funding, and therefore due process requirements were not applicable. The court stated that the students excluded under the terms of a catalog regulation had no constitutional, statutory, or contractual right to notice of the charges in a hearing before expulsion.

Earlier this year, the District of Columbia Court of Appeals rendered its appellate decision on Howard University. It is a most interesting opinion, because one of the judges, Burger, is now Chief Justice of the Supreme Court, and one of the other judges was J. Skelley Wright, the judge who ruled in the court of first instance that Tulane was a state school. The opinion is difficult to evaluate because it avoids the issue of state action, saying that the court's decision makes it unnecessary to deal definitively with the claim that the university is vested with a public character. This claim was an integral part of the student aspect of the case argued by Mr. Michael Nussbaum, general counsel to NSA. The student claim was dismissed as moot, because several of the students had been allowed to re-enroll and graduate, and others had transferred to other institutions. The court, however, hinted that "what was once widely assumed to be purely private activity is a fluid and developing concept." Another unique feature of the case is that the faculty appellants were remanded back to the district court with instructions to grant them a university hearing of their dismissal in spite of the university catalog denying such, because of the special circumstances surrounding the case. Does this mean that there are two standards of rights - one for faculty and one for students? This would be particularly shocking in view of the emerging trend of campus judicial systems, which afford common rights and remedies to all members of the university community - faculty, students, and staff.

Although rendered by a lower federal court, the decision growing out of the Columbia University demonstrations in the spring of last year has some interesting aspects. It is a classic example of "legal confrontation" in which the theory of state action is clearly rejected. The plaintiffs argue that Columbia was so impressed with a public interest as to render it amenable to the reach of the 14th Amendment and therefore to the protection afforded by that amendment to the rights guaranteed in the 1st and 5th Amendments. They relied upon a series of cases in which the Supreme Court or the federal courts found that certain privately owned entities were engaged in state action either because they performed activities that were governmental and public in nature, or because the state through its financial aid and other involvement had become intertwined with a private entity. Judge Frankel distinguished three of these cases which are frequently cited by legal authors as a perspective rationale for federal jurisdiction, namely, Burton v. Wilmington Parking Authority, Marsh v. Alabama, and Terry v. Adams. The court stated that there was no case which indicated that acceptance of state funds constituted state action and that the disciplinary proceedings involved no state action. To show state involvement the plaintiffs had pointed out that a large percentage of the university's income had come from public funds - some 50 million in

1966 out of a total of 118 million and in 1967 about 60 million out of a total of 134 million. The plaintiffs further argued that there were other forms of governmental benefits and assistance to the university, and they specified in this connection a lease by New York City of public land for the construction of the controversial gymnasium. In his opinion the judge pointed out that over 80 percent of the proposed funds received by Columbia came from federal sources rather than the state government. Therefore, the jurisdiction which the plaintiffs sought based on state action was not provided by federal funds. Furthermore, the receipt of any money from the state was not enough to make the recipient an agency or an instrumentality of the government. In the court's opinion the plaintiffs failed to show a requisite degree of state participation and involvement in any of the university's activities, let alone the specific disciplinary procedures in question.

Several simple conclusions can be drawn from this decision. First, the receipt of federal aid by a private institution has no significance in determining what constitutes "state action." Second, the court has hinted that the relationship of state aid and revenue to the total university budget will be a starting point in future cases. Finally, a student will have to show that the state has done more than contribute financial aid to a private university, such as, delegating an actual exercise of state governmental power.

In addition to urging jurisdiction under the legal theory of state action, the plaintiffs challenged the very leadership in the university. The plaintiffs were students, alumni, and neighbors. They alleged first, that the President in his administrative capacity violated the fundamental integrity of the university community by calling in the police without regard to the appropriate self-government of the institution, namely, the faculty and the student body. They claimed he should be enjoined from calling in the police in the future.

Secondly, the university structure does not provide participatory power in faculty or students for the determination of policies and programs. The present structure is self-perpetuating and violates their constitutional rights. They specifically requested a court order to restructure the university based upon a program to be submitted by them to the court. Had the court found grounds for jurisdiction, can you imagine the educational world's reaction to a court order restructuring a private university?

Several months later a court of appeals from that very same circuit - the second circuit - had an opportunity to intervene into the disciplinary affairs of a private institution on the strongest grounds yet provided. Powe v. Miles reveals that Alfred University, a private institution, operated a College of Ceramics under a contract with the state of New York and received financial support for said college. The state paid all of the direct expenses of the College of Ceramics. In addition, the state paid a stipulated sum per credit hour for courses taken by Ceramic College students in the "private sector," with a corresponding payment by the private sector for instructions the Ceramic College gave students in other colleges of the university. The state reimbursed Alfred University for a prorata share of the entire administrative expense of the university including the salaries of the President, the Dean of Students and other general officers, as well as utilities and overhead. The state's last annual appropriation for the Ceramics College was approximately $1,800,000. This was 20.75 percent of the total Alfred budget. There were some 550 students and 40 faculty members in the College of Ceramics as compared with the university's totals of 1800 and 140.

The arguments urged by the plaintiffs were quite similar to those urged in the Columbia situation, namely that Alfred University performs a public function. The plaintiffs, however, went a little further in urging that the President and the Dean of Students allegedly act as agents of the state with respect to the Ceramics College students. Therefore, they should be regarded as so acting with respect to all students. The plaintiffs in question had been suspended from Alfred University for the remainder of the spring semester and for the first semester of 1968-69, with leave to apply for readmission in January, 1969. Their disciplinary penalties grew out of a demonstration that occurred on the campus in connection with the annual Parents' Day. Since the founding of an Army ROTC unit on the campus in 1952, a military review had been scheduled as one of the Parents' Day activities. It was customarily held on the university's football field so that the parents could see the cadet corps in marching maneuvers, and then the presentation of awards to cadets who had excelled in the military science program. During the week preceding Parents' Day, members of the SDS chapter on the campus had met to discuss the possibility of staging a demonstration during these ceremonies. The students did not confer with the Dean of Students about their plan to demonstrate or give his office the 48 hour prior notice required by the policy on demonstrations. As the military review began in the stadium, the sixteen demonstrators entered the field and paraded between the reviewing stand and the cadets then assembling on the field. They carried signs advocating scholarships for black students, the teaching of Negro history, an end to compulsory ROTC, and peace in Viet Nam. They marched up and down and came to rest directly before the stands facing the audience and held their signs up for maximum visibility. Shouts were exchanged between the demonstrators and the spectators. After about 5 minutes the Dean of Students, concluding that the demonstrators intended to remain indefinitely, announced by microphone from the pressbox that their actions were in violation of the demonstration guidelines and requested them to conform by removing themselves from the field. Eight of the student demonstrators obeyed this announcement. Seven of the students and a faculty member stayed where they were. The Dean repeated his request four times - twice to the students and twice to the faculty members. He then declared those disobeying his order provisionally suspended from the university and informed them that they could pick up the charges against them at his office that afternoon and that a hearing would be held the following morning. The remaining demonstrators were a direct obstacle to the vision of those in the reviewing stand and in the lower tiers in the grandstand. Because of the interposition of the demonstrators between the marching cadets and the stand, certain elements of the procession were altered. During the heart of the ceremony - the presentation of awards - each of the officials had to be led around the line of demonstrators to present their respective award.

After the students' request for a week's delay, a Faculty-Student Review Board heard the cases and recommended to the President that the students be separated forthwith from the university. The President modified the penalty as I have just cited it to you. Of the seven students charged, four were students in the Liberal Arts College and three were students in the Ceramics College. The court ruled that Alfred University's action with regard to the Liberal Arts students was private action, and the action with regard to the Ceramics students was indeed state action. However, the state students who refused to obey the Dean's order were not deprived of any federal rights because the demonstration guidelines were reasonable, I commend to your reading, "Alfred University's Guidelines." Just as in the Grossner case, plaintiffs urged that all of Alfred University's actions constituted state action. Judge Friendly, speaking for the court, pointed out that on a strictly literal basis whatever Alfred University does is under color of the New York statute incorporating it. But this is also true of every corpora-

tion chartered under a special or even a general corporation statute, and not even those taking the most extreme view of the concept have ever asserted that state action goes that far. In answer to the claim that Alfred University performs a public function, he distinguished once more Marsh v. Alabama and the more recent Supreme Court case, Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., which extended the public function concept to cover public walkways and parking areas of a privately owned shopping center. As concluded from Grossner, the fact that New York has exercised some regulatory powers over the standard of education offered by Alfred University does not implicate it generally in Alfred's policies towards demonstrations and discipline. The degree of state and federal aid, excluding scholarships to students and the contract provisions for the Ceramics College, was only a hundred to two hundred thousand dollars a year compared to a total budget of 6.8 million dollars. This was a long way from being so dominant as to afford a basis for the contention that the state is merely utilizing private trustees to administer a state activity.,

Interestingly enough, neither case, Grossner nor Powe v. Miles, mentions the Tulane decision. And yet the Powe court makes a gratuitous statement on the very area involved in the Tulane case. The court said, "No one would question for a moment that the establishment of a discriminatory admissions policy for the Ceramics College by Alfred University trustees not simply against blacks, but against Jews or redheads, would constitute state action, although similar policies in other colleges might not."

The latest appellate decision, Browns v. Mitchell, and the latest district court decision, Torres v. Puerto Rico Jr. College, sustained non-state action. In Browns v. Mitchell, 39 students suspended by the University of Denver argued that the tax exemption which the school received from the state is equal to a financial contribution to promote public education and therefore the university is an arm of the state. The 10th Circuit Court of Appeals rejected this argument and declared the university was a private institution and that there was no evidence that the state was involved in the university's internal affairs.

In the Torres case the institution had received certain funds as grants from the federal government for plant development and for its regular operations as well as loans from different federal sources. In addition, its students received scholarships from several agencies of the commonwealth. The Puerto Rico District Court held that the college was neither a state nor a federal agency nor was acting under state or federal authority.

This series of cases would seem to put to rest the question of the applicability of the state action theory to private institutions. Yet, two other legal expressions may result in an extension or revival of the state action theory. The first is found in the recently published Report of the American Bar Association Commission of Campus Government and Student Dissent. In a footnote on page 17 of this document, you will find a sort of minority report. It states, "The relationships between private educational institutions and the government through grants, research projects, and tax benefits have become so pervasive that few institutions can be considered to be private enough to be excluded from the reach of the 14th Amendment. Even if a college or university qualifies as private, its role toward the individual is so dominant, and the student so limited in his ability to go elsewhere, that the individual should be afforded rights against such private dominance just as the individual is afforded rights against the state by virtue of the 14th Amendment. While the 14th Amendment has not generally been held to apply to cases of private dominance, the amendment sets a standard to which our society

should aspire. Colleges and universities should be among the first who opt for that standard."

The second legal manifestation which may have a far-reaching effect are state educational laws furnishing financial aid to private institutions. Such aid could be in the form of tuition to educate state residents or in the form of financial assistance in the funding of facilities. Any fiscal assistance legislation which carries clauses imposing financial sanctions on disruptive students would surely be construed as state action. Rising costs may well compel your institution to seek out financial resources which import a change in its legal status.

The question of civil rights resulting from federal financial aid and federal legislation affecting internal university matters remains to be faced squarely, in spite of the Howard University decision and the Torres v. Puerto Rico Jr. College decision. One federal court decision and one federal administrative decision indicate that other opportunities for federal jurisdiction over private universities bear careful watching.

A Washington, D. C., district court was asked to resolve a dispute between Marjorie Webster Jr. College and the Middle States Association of Colleges and Secondary Schools over accreditation. The college, a family-owned institution in Washington, D. C., last year earned a gross profit of $200,000. However, its affluence has been of diminishing value because of its lack of accreditation which made it difficult for its students to transfer to 4-year colleges. Consequently it sought accreditation from the Middle States Association but was rebuffed because of its proprietary character. One of the criteria for accreditation is that the applicant must be a non-profit organization with a governing body representing the "public interest." The college took the association to court on the grounds that its arbitrary refusal of accreditation was a violation of the Sherman Anti-Trust Act.

The Sherman Act applies only to trade and commerce; however, that was the ground-breaking question put before the court - is higher education a commercial enterprise falling within the regulatory authority of the act?

The Association argued tradition. The act was created to break up the great trusts, it said, and has never been applied to non-commercial activities of the learned professions. The college, on the other hand, argued that it was not a question of whether the defendant was engaged in trade but whether the university's trade had been restrained.

Judge John Lewis Smith, Jr., in rendering his opinion, said that profits and quality in education are not mutually exclusive. He rules that "higher education today possesses many of the attributes of business" and that "to hold otherwise would ignore the obvious, and challenge reality." Webster College's trade had indeed been restrained in violation of Section III of the Sherman Act. The Association was ordered to examine Webster College on its academic merits. The legal view of a college as a commercial enterprise engaged in trade and commerce could have far-reaching effects, not only on its tax exempt status, but possibly on its total federal jurisdiction.

More recently, the National Labor Relations Board asserted jurisdiction for the first time over a private, non-profit university because of its "massive impact" on interstate commerce. In a unanimous decision the board extended its jurisdiction, by ordering a representation election among the non-professional

employees at Cornell University. It said it stepped into the Cornell situation because of the school's size and because its 143 million dollar a year budget plainly evidenced that it is engaged in commerce. The decision didn't spell out what guidelines the board will use in future assertions of jurisdiction over private, non-profit institutions. The decision did indicate that the dollar volume of a school's operations will be one criteria. I can easily foresee the reaction of the student populace over the neglect of their rights in favor of the non-professional employees of a private university. The impact of these two decisions could prove quite interesting.

As you may expect, the reading and interpreting of court decisions in these sensitive areas is an art. Let me illustrate by quoting portions of the opinion of Claiborne et al. v. McLain. The opinion states, "Although the driver of a car was clearly negligent in hitting a steel bridge abutment, the girl who was riding with him could not recover for her injuries, since she had been contributorily negligent in failing to protest that the driver was not taking proper precautions for their safety. The driver and the girl had been petting until only about a minute before the accident. The girl admitted that she had been lying on the front seat of the car with her head in his lap and had removed her clothes exposing the upper half of her body to his sight and touch." The court concluded that the girl had so aroused and distracted the driver that he was hardly aware of what he was doing at the time of the accident.

The court rejected the argument that since the driver had moved his hand from the girl one minute before the impact and lit a cigarette, her conduct could not have been the proximate cause of the accident. That argument erroneously assumed that in such a short interval of time the driver, with the girl's body still exposed, could have regained his composure and again devoted his attention to driving. Moreover, the girl was also contributorily negligent in reaching for the cigarette he attempted to hand her underneath the steering wheel when he saw another car containing people who knew his father. The boy was concerned since his father did not know he smoked.

Earlier I mentioned several other legal theories that might be applicable to private institutions, specifically in loco parentis and the fiduciary concept. Allow me to treat them briefly before proceeding to a discussion of the theory of contract. The most recent theory considered has been the fiduciary one. It imposes upon university administrators an obligation of prudent and reasonable administration of their institution and its personnel, including students. There have been several legal articles written about this concept but no decisions applying it.

For all practical purposes the in loco parentis concept is a thing of the past, and yet consider a recent law suit filed in Cincinnati, Ohio. A $370,000 suit has been filed against the University of Cincinnati by the parent of a co-ed who became a drug and narcotic user while a student at that institution. The suit is filed against the university, its President, its Dean of Women, and two ladies in charge of the somen's residence halls. The suit contends that the university failed to protect the co-ed with the result that the daughter had been allowed to associate and become involved with a 23 year-old ex-convict, white slaver, and heroin user. The suit further claims that as a result of this association the co-ed had been misled through some of the most disreputable haunts of the underworld in at least three different states. More importantly, the suit blames the university for the disappearance of the co-ed, a fact of which the parent had not been apprised, until approximately eight days after her disappear-

ance. Subsequently the girl was located in the Detroit area and admitted to a hospital in Chicago as a drug addict. Granted, this case represents a rather extreme situation. Nonetheless, it does reflect the feelings of a considerable number of parents of college-age students. I think we can certainly anticipate more legal activity on the part of parents regarding the welfare of their children as well as the quality and nature of educational programs that our institutions are currently providing.

Occasionally you may hear a legal theorist mention the possibility of a status theory being applicable to private institutions. It is somewhat similar to contract theory in that it places the university in the advantageous status. In other words, the university's powers to discipline its students and to act toward all students derives from its basic power to exist and accomplish the university's purposes. I know of no cases affecting private institutions which advocate this theory; however, the possibility of this theory is hinted at in the Goldberg decision. The Goldberg decision, which is frequently referred to as the inherent power doctrine, might be extended to private institutions on the grounds that its power is granted from the state through its charter or articles of incorporation. Thus, if an institution has the power to act to accomplish its educational purposes and goals, logically it would have the incidental powers reasonably required to accomplish these purposes. Courts would then examine the abuses of any of the incidental powers.

Traditionally courts have relied with some frequency on a contract theory to describe the relationship between a student and a private institution. When this approach is used, the terms are derived from the traditional relationship or long-standing customs of the schools and are considered as adopted by the student's act of enrollment. Where possible, however, courts find an expressed contract, whose terms are contained in college catalogs or bulletins or other university documents. This type of literature usually reserves broad discretionary powers in the university. For example, a clause may be included which permits the institution to expel the student "at any time, for any reason deemed sufficient and no reason for requiring such withdrawal need be given." This type of statement has been typical in the traditionally cited cases such as Anthony v. Syracuse University. Most legal authorities have felt that any suspension or expulsion based on such vague standards violates basic contractual principles. In such cases it would appear that the burden has been placed upon the student to prove that his conduct did not violate a vague standard. My common-law colleagues here would categorize such contracts as unconscionable or contracts of adhesion. In such a contract one of the parties has a decided legal advantage. Put more bluntly, a court reviewing the actions of a private institution under such a vague contractual regulation would be prone to strike it down.

Several years ago any application of the contractual theory might have been abandoned on the grounds of the incapacity of minors to contract for anything but the necessities of life. Education heretofore has never been considered a necessity of life. However, the impact of recent legislation giving minors the capacity to contract for educational loans, such as "The Uniform Minor Capacity to Borrow Act" would probably defeat an argument of minority. It would also be possible to define the relationship as a contractual one if a third party beneficiary contract were executed with the parents. The parents bargain and contract, and the student receives the benefit. A common example of this theory is an insurance policy. I am quite certain students would question the right of their parents to participate in such contractual negotiations in this day and age.

Rather than concern ourselves with historical cases I will briefly review the most current cases applying contract principles. A recent New York state court case has applied a stricter test of contractual principles to the student-university relationship. In Drucker v. New York University, the court held that charging a graduate student with acceptance of the contents of an entire school bulletin was sheer fiction. The mere mailing of the bulletin to the student could not make its contents binding in the form of a contractual obligation. The student in question, a graduate student, had withdrawn from the university six days prior to the opening of the term. The school had refused to refund his registration on the basis of the statement in the bulletin which said, "No tuition or fees returnable after the due date." The court found the retention of this registration fee a penalty and limited the university's damages to those actually sustained. This case clearly indicates that the courts are going to take a closer and deeper look at terms of contracts entered into between students and private institutions, particularly in the realm of financial penalties. I can easily see this judicial scrutiny applied to disciplinary action both behavioral and academic.

A foundation for court intervention where there is clear abuse of discretion by an educational institution was laid in an Ohio decision which preceded Drucker by approximately a year, entitled Schoppelrei v. Franklin University. There the court held that although the governing boards of private colleges and universities had the right to make regulations and establish scholastic requirements without interference by the courts, an allegation of discrimination in the enforcement of such a regulation implies a lack of even-handed justice amounting to an abuse of discretion, sufficient to invoke the jurisdiction of a court.

Even the elite girls' colleges have been the subject of judicial review. Before a New York court, in Jones v. Vassar, the parent of one of the girls sought to restrain the enactment of more liberal parietal rules. In spite of the fact that a substantial majority of the student body had voted for the new rules, the mother argued that the university was breaching an implied contract to not change such rules during their daughter's enrollment. The court ruled that there was no implied contract or proof of present or future damages. Furthermore, "It is the privilege of a college through its student government association to promulgate and enforce rules and regulations for the social conduct of students without judicial interference." This statement reflects considerable respect for student government and student rights by a state court.

The case of Sturm et al. v. Trustees of Boston University, decided by a Massachusetts court in April of 1969, provides the most far-reaching analysis of the relationship of a student to a private institution. This decision virtually imports some of the elements of due process into the academic separation of a student. Briefly, the facts are that the plaintiff, a 19 year-old student enrolled in the College of Liberal Arts of Boston University, was expelled for purportedly cheating on a final examination in biology. According to the facts the student had become ill during the examination and had left the examination room before the close of the examination. In departing, he left his examination book on his desk. When the examination was over and the books were collected, the plaintiff's examination book had not been turned in. The student made an effort to get the professor to take his examination book late, but the professor refused. Instead of taking the examination booklet with him, the student left it on the table where the professor had placed the corrected examination papers. The plaintiff's examination book was intact and stapled together whereas the papers on the table were all separate sheets from examination books which had been unstapled for the purposes of correction. The professor felt that the plaintiff had tried to sneak his

book in for correction and emphatically refused to accept it.

As a result, the professor referred a complaint of breach of academic discipline to the Student Academic Conduct Committee. This committee is composed of five professors and their advisor, the guidance counselor of the university. In the committee's first meeting, only the complainant was present to tell his side of the story. A second meeting was held in which the plaintiff was told in substance what the professor had said in the first meeting and then invited to give his side of the story. Subsequently, a third meeting was held and the committee voted to recommend the expulsion of the student to the Dean of the college. The Dean effected the decision through a letter written to the plaintiff. However, the transmission of the letter was defective so that neither the plaintiff nor his parents were aware of the expulsion until they received a follow-up letter approximately four months later. In the meantime, the student had continued his studies at the university. Immediately the student retained counsel and requested a rehearing of his own personal counsel. This letter was referred by the Dean to the committee, but nothing was done for approximately two months. at which time the student went to court and obtained a restraining order against the university.

Subsequently the court found that principles of fairness and justice had been abused. The court specified that clear notice of the specific charges against the student should have been given. It should have been given sufficiently in advance of any hearing so that the student could consult with his parent, guardian and/or lawyer, if necessary, for advice, guidance, and protection. The student should have been allowed to have his attorney with him at all hearings to help with reference to the student himself and his accuser, and the lawyer should be given leave to ask questions of witnesses within reasonable limits established by the university. The court also mentions a right of appeal. In voiding the expulsion, the court emphatically points out that although the relationship between the student and the institution is a contractual one, certain standards of fairness and justice are required. It also states that continued non-application of the principle of due process has little, if any, validity.

There is an implied contract between the plaintiff and Boston University whereby the plaintiff agreed to pay his tuition and other charges, and agreed to abide by whatever reasonable rules, regulations and standards as promulgated with reference to all students. In fact, the student and his parent had at the time of admission signed a statement to observe these rules. The court ruled that the university rules and regulations were an "unpublished item" even though vague references to suspension or dismissal were made in the school's undergraduate bulletin and student handbook.

Quite interestingly, a faculty handbook of the university setting forth the procedures in cases of faculty members, was introduced in evidence. Included were the right to counsel, the right to receive a copy of the charges, the right to examine witnesses and have the evidence recorded.

Can you foresee the student reaction at an institution where one member of the university community, the faculty, is given fair play and the student is not?

This case, I feel, is strongly indicative of the coming trend of deeper examinations of the student-institutional contract, with an emphasis on fairness.

Although this a state court decision granting the right to counsel, recall my earlier discussion of Powe v. Miles concerning Alfred University. In that federal

decision the court acknowledged the right to counsel in describing the facts of the case.

One of the more unique contractual questions was recently raised in federal court in the case entitled Krawez v. Stans. Certain midshipmen, enrolled at the United States Merchant Marine Academy, were interrogated by federal narcotics agents concerning the use of marijuana at the Academy. The interrogation took place on the campus with the assistance of officials of the Academy. The midshipmen were assured that nothing said would "leave this room." Two of those questioned were suspended based upon statements that they had made during the interrogation. They brought this action seeking readmission. The court ruled that those questioning them were acting as agents of the Academy; that, as agents, they had made a promise to the midshipmen, and that the Academy was bound by this agreement.

It is clear from the contractual cases which I have discussed that there is considerable legal activity on the horizon for private institutions and their student litigants.

In this presentation I have devoted little time to discussion of cases growing out of student protest. There is a simple explanation of this and that is most of the reported cases involve state institutions and have been brought to court under the state action theory. However, there are two cases which may be of interest to you in which private institutions have invoked the injunctive process as a remedy to a student demonstration. In Megantz v. Ash, Dartmouth University obtained a federal injunction against the student demonstration on its campus. Local police arrested fifty-six students for criminal contempt. The trials were set less than two days later. Forty-five of the students were denied continuances, were convicted, and were sentenced. Five of them subsequently submitted affadavits and testimony from by-standers indicating that they had not occupied the building. The First Circuit Court of Appeals held that the five students had been prejudiced because they did not have an opportunity to prepare their defense, which involved outside witnesses. It remanded the cases to the district court for re-hearing. At the school's request, the court enjoined the suspended students from interfering with the operation of the school or its students and faculty.

A New York Supreme Court has also invoked the injunctive process and subsequent criminal contempt. The New York Court found eight members of the Students for a Democratic Society guilty of criminal contempt for ignoring a restraining Order which prohibited students from illegally occupying any academic or administrative building on the university for the purpose of interfering with the normal functions conducted by the university. Since the defendants have defied the order of the court, they must be prepared to pay the penalty, the court said in Trustees of Columbia University v. The Students for a Democratic Society, and it sentenced the students to a term of imprisonment of 30 days and a fine of a $100 each.

A facet of the student's right of privacy was dealt with in the decision entitled Cole v. Columbia. There the federal court ruled that Columbia University could not be enjoined from producing certain student information about its demonstrations under federal congressional subpoena.

The cases I have cited to you are but a beginning of many legal cases yet to be filed. New issues have arisen on campus...student power for one...can students control their own affairs, influence curricula decisions and participate in policy formulation basic to university life? No longer are students merely concerned with

the shape of the curriculum, the grading policies, the teacher-student relationships, and the academic orientation programs. A third major area of issues is the relationship between the university and society. It raises questions such as for whom and for what reason should university research be conducted? Where do universities invest their money? And finally, the issue of the student's role as a citizen in the university community. This will give rise to questions in the realm of right of privacy in student residences, visitation policies, requirements to live on campus, confidentiality of student records, and freedom of the student press. These issues and many more may be expected to confront university administrators on the campus and in the courtroom. Even your institution's position on student involvement in the forthcoming national elections will foster possible protest, discipline, and legal activity.

In facing issues and possible confrontation, educational institutions need to look further than the scope of their disciplinary programs, procedures, and sanctions. They need to determine goals and objectives for their disciplinary programs that parallel the goals and the objectives of the university. Adoption of formal legalistic procedures is only one step among many. Strict due process does not provide for the wisdom and experience of guidance and counseling; it does not utilize the benefits of student self-government; it does not make allowance for the technical errors and errors of judgment that faculty members and students are apt to commit. It does not fairly consider the total academic environment and the adolescence and motivation of students. In brief, the total educational experience encompasses more than disciplinary due process.

The probability that you will encounter some facet of the emerging educational law is high. Hopefully, it will not be in a serious confrontation. While preparing for the physical and mental challenges that await you, you may find comfort in the following prayer:

> Dear Lord, help me to become the kind of administrator the students would like to have me be. Give me the mysterious something which will enable me at all times to satisfactorily explain policies, rules, regulations, and procedures legally and morally, even when they have never been explained to me.
>
> Help me to teach and train the uninterested and the dim-witted without losing my patience and my temper. Give me that love for my fellowmen, which passeth all understanding, so that I may lead the recalcitrant, obstinate, no-good students into the paths of righteousness by my own example, instead of permanently suspending them from the college.
>
> Instill in my inner being tranquility and peace of mind, that no longer will I wake from my restless sleep in the middle of the night, crying out, "Why picket me, I'm just an administrator."
>
> Teach me to smile if it kills me. Make me a better leader of men by helping me develop larger and greater qualities of understanding, tolerance, sympathy, wisdom, perspective, equanimity, mind-reading, and second sight.
>
> And when, Dear Lord, Thou hast helped me to achieve the highest pinnacle my superiors have prescribed for me, and when I

shall become the paragon of all deanly virtues in this mortal world -- then, Dear Lord, MOVE OVER!

CITATIONS

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Anthony v. Syracuse University, 224 App. Div. 487, 231 N. Y. S. 435 (1928).

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JUDICIAL REMEDIES FOR STUDENT PROTEST PROBLEMS

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A recent article on student demonstrations begins with these words:

> What is happening to our young people? They disrespect their elders, they disobey their parents. They ignore the laws. They riot in the streets inflamed with wild notions. Their morals are decaying. What is to become of them?[1]

The author then observed that these were the words of Plato, as if to comfort us that we are not the first civilization to encounter student disorder. I take no comfort from this fact, for look what became of the greatness of Greece in Plato's time.

There are problems today which must be dealt with, lest someone two thousand years from now mistakenly take comfort from today's disorder, unable to understand what has become of our civilization, and of our democratic institutions.

Usually when you gentlemen reach the point of considering "Judicial Remedies," your problem has erupted. Your attendance here shows that you do not plan to wait for the eruption. Judicial remedies are like surgery - they leave scars. They also are like medicine - they can lose their effectiveness from overuse. Therefore, prepare before spring, because prevention is preferred over therapy. Moreover, judicial remedies require advance preparation to be effective.

At the outset I would like to discuss the half dozen legal and extra-legal remedies available to you in dealing with student disorders. I shall refer to the extra-legal remedies so that you can make intelligent choices among them. Few, if any, are mutually exclusive and use of several combinations should be considered, depending always on your particular facts and circumstances. After analyzing these remedies, I shall undertake to point out the interrelationship between them.

There are a half dozen judicial and non-judicial remedies available to you, depending on the nature of the disturbance:

A. Non-Judicial:

1. Ignore the demonstration (not applicable to property damage and destruction):

   As recently as 1969, administration officials at the University of Chicago chose to ignore a group of demonstrators which occupied a building for fifteen days.

2. Utilize student disciplinary measures:

   At the conclusion of the University of Chicago sit-in, 42 students

were expelled and 81 were suspended.[2] Observe the interrelationship between these first two remedies.

Discipline may be used to halt a disturbance. You might serve notice of hearing during a sit-in, so that the student must choose between continuing the sit-in or having his expulsion entered by default when he fails to appear. (Disciplinary measures obviously will not work with non-students, or if your disciplinary officers are sympathetic to the demonstrators.)

3. Out-wit the demonstrators (in non-serious cases):
   (A) If feminists occupy the men's locker room and halt your male athletic program, consider introducing white mice into the occupied building.
   (B) If the building is occupied by male students, give away free beer near by.
   (C) Discontinue utility service (electricity, water, etc.) to the building, but do not disconnect the fire alarm or sprinkler systems.
   (D) Initiate a more popular, controlled demonstration elsewhere, so that the by-standers are attracted away and the hard core must declare its allegiance to one cause or the other.
   (E) Think up a new version of the trojan horse.

4. Use campus police:
   There is only a degree of difference between the use of campus police and the use of public police (discussed below). The use of national guardsmen is a degree beyond the use of public police.

B. Judicial Remedies (in reverse order):
   1. Civil Suit for Damages:
      Where one or more persons, students or non-students, destroys or damages property, a civil suit for recovery of damages, including possible punitive damages, will lie. The disadvantage is that the delay involved in getting the case tried usually minimizes this device as a means of terminating the disturbance. However, it should not be overlooked in cleaning up a destructive demonstration and preventing recurrences. Moreover, the mere filing of the complaint seeking damages may act as a deterrent to further destruction.

   2. Criminal Sanctions:
      Some demonstrations can only be ended by the use of criminal sanctions. The disadvantage is that this involves the introduction of police, accompanied by flash bulbs and paddy wagons, onto the campus. There is the risk of escalation in the conflict and over-reaction by police and/or students. Those students who make up your silent majority generally will not be sympathetic to the police or to you for calling them. They may feel that you have admitted loss of control of the situation by calling for the "cops."

      On the other hand, do not publicly rule out in advance the use of police. Even uncalled, they act as a deterrent. In preparation for an emergency, you should confer with local officials in advance, and keep them posted during a disturbance.

3. Injunctions (court orders):

Injunctions have thus far proved the most effective legal remedy in ending student disturbances. They have several advantages:

(A) Like President Kennedy's blockade of Cuba, injunctions are a temperate middle ground between doing nothing and declaring war.

(B) The battleground is moved from the campus to the courtroom, where traditional rules govern the conflict.

(C) So far, most of the demonstrators have been willing to have the controversy transferred to the courtroom and have expended their energy on preparation for trial.

(D) Some court orders have been and will be resisted physically by the demonstrators, at which time law enforcement officials must move in. However, the court calls them into action, not the university. They usually are non-uniform police, which is like using federal marshals in Alabama as opposed to the national guard in Little Rock, Arkansas.

(E) Most students, and that includes some militants as well as the silent majority, do not identify with police but do identify with courts. They have seen social change meted out by the courts, and they respect the courts. They generally have been amenable to court decisions and orders controlling student demonstrations.

To maintain that respect and hence the effectiveness of court injunctions, you should:

(1) Use injunctions sparingly. (Consider using other remedies available.)

(2) Select, if the choice is yours, a court or judge respected by the students rather than one you know will grant the injunction you ask for. The University of Georgia is fortunate in this respect. Judge Barrow's reputation among the students may in large measure account for the obedience to the orders he issues.

(3) Do not seek an overly broad or vague injunction. Ask for no more than you have the right to demand. Do not run the risk of reversal on appeal.

(4) Follow up an injunction with student disciplinary proceedings.

(5) Be prepared to seek enforcement of the injunction. Any injunction which is disobeyed without contempt citations being issued weakens this method of controlling disruption.

(F) Contempt of court citations are a speedy enforcement device, faster in fact than criminal trials.

(G) All in all, injunctions afford the demonstrator with a means of terminating the demonstration without either surrendering (the dispute continues, but in the courtroom) or being locked up in jail.

In preparation for use of the injunctive remedy, you should consult with your attorneys and have them prepare a brief and skeleton petition seeking an injunction as against claims of freedom of speech and freedom of assembly.

Properly prepared, an attorney can be ready to obtain an injunction within a matter of a few hours after you direct him to proceed. If you have advance warning of the disturbance, the attorney may be able to appear in court within one hour

of the outbreak of trouble. The hour's delay probably will be required so that notice can be given to the demonstrators that an injunction will be requested, and they have an opportunity to obtain an attorney and appear in court. This is a requirement imposed by the Supreme Court and failure to afford the students these rights may nullify your injunction.[3]

Be prepared to furnish your attorney with as many names of the students involved as possible, including one or more from the county in which your school is located. Also, supply him with as many photographs as can be obtained, identifying as many students as possible in those photographs. Make tape recordings of noise disturbance, and of obscenities and speeches inciting riots. Preserve the evidence your attorney will need.

Those are the legal and extra-legal remedies available - ignore the demonstrators, utilize student disciplinary measures, out-wit the demonstrators, sue for damages, initiate criminal proceedings, and sue for injunction. As I have stated, they are interrelated.

In order to get an injunction, it will help if your rules of student conduct are properly written, so that the petition can show violations of specific, valid rules. Also, it will help if your state's criminal laws are properly written, so that the petition for injunction can show violations of specific, valid laws.

In this connection, Mr. Henry Neal, Executive Secretary of Georgia's Board of Regents and one of the authors of our new Criminal Code, has extracted those provisions of the code applicable to student demonstrations. It is a comfort to have a list of crimes in advance, from arson to weapons, and including false imprisonment, possession of explosives and incendiaries, damage to property, trespass. theft, riot, false alarms and obscene language.

It is not desirable to have your student conduct rules patterned after the criminal laws. In fact it is desirable that they not be co-extensive. The rules should be for students, and the ingenuity of students for misbehavior is greater than the rule making genius of legislators and even school administrators.

There should be a rule to the effect that acts constituting a violation of a state criminal law would be grounds for expulsion or suspension, and there should be a rule to the effect that conviction of violation of a state criminal law would be a prima facia ground for expulsion or suspension, allowing the student another chance to prove his innocence.

Rules must be applied equally to all students, as a predicate to judicial relief. If you have a rule against the use of bull-horns and other amplifying devices during certain hours in certain areas of the campus, you can not enjoin violation of that rule if you permit candidates for class office to use bull-horns as part of their election campaigning, or if you permit fraternities to hold street dances with juiced-up juke boxes.

You should enforce your rules even-handedly and consistently or they will be ineffective when you dust them off to use against unpopular demonstrators. Similarly, once you have obtained an injunction against some students, do not issue permits to others which would violate the injunction. For example, if you enjoin the S.D.S. from having its meetings on the tennis courts, do not allow the Sigma Nu's to have a state convention on the baseball field.

The ultimate choice of remedies lies with the school administrator. In selecting which remedy or remedies to use, he should consider the nature of the disturbance, its objectives, his faculty and student body, his superiors and the public, particularly the community in which the institution is located, and the historic relationship between his students and the local police and the courts. He should think first of how to prevent the disturbance and think secondly of how to out-think it.

The ultimate solution to student disorders will be resolution of the problems which create those disorders. In the meantime, it is necessary to utilize, selectively, the various legal and other remedies available, to control the outbursts themselves.

REFERENCES

1. Herman, "Injunctive Control of Disruptive Student Demonstrations," 56 Va. L. Rev. 215 (1970).

2. N. Y. Times, April 27, 1969, p. 65, Col. 1.

3. Carroll v. President & Commissioners of Princess Anne, 393 U. S. 175 (1968).

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